88-1404

SUPREME COURT, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1988

MONSANTO COMPANY, ALLIED-SIGNAL, INC. AND EM INDUSTRIES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 23, 1989

QUESTIONS PRESENTED

1. Can a court, over a defendant's objection, mandate bifurcation of liability and allocation issues in a cost recovery suit under The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") into two separate actions without complying with Federal Rule of Civil Procedure 54(b)?

2. In fashioning a uniform "federal common law" for when joint and several liability is appropriate under CERCLA, did the court below err in adopting the standard of liability under Section 433A of the *Restatement (Second) of Torts* but rejecting the burden of proof provisions of Section 433B?

3. By creating federal rights and remedies outside congressional guidelines, did the court below ignore this Court's recent admonitions to lower federal courts, based on separation of powers principles, to avoid unguided resolution of important questions of public policy.

LIST OF PARTIES

The parties to the proceeding below were the United States of America, the South Carolina Department of Health and Environmental Control, Oscar Seidenberg, Harvey Hutchinson, Monsanto Company, Allied-Signal, Inc. (formerly Allied Corporation), and EM Industries, Inc. EM Industries is a wholly owned subsidiary of Merck A.G., Zug., Switzerland. Monsanto Company owns less than 100 percent of the following companies:

Monsanto Chemicals of India Limited
Monsanto Chemical (Thailand) Limited
Monsanto (Malaysia) Sdn. Berhad
P. T. Monagro Kimia
Advent Eurofund Limited
Advent Techno Venture Investment Corp. N.V.
Andreae-Noris-Zahn AG (ANZAG)
Biolab Industrias Farmaceuticas S.A. (BIOLAB)
Chipman Limited
Companhia Brasileira de Estireno (CBE)
Fosbrasil S.A.
HybriTech Europe SNC
Industrias Resistol, S.A. (IRSA)
Invitron Corporation
Kinetek Systems Incorporated
K.K. Astro
Korag Company Limited
Korsil Company Limited (KORSIL)
Kumho Monsanto Inc. (KMI)
Mitsubishi Monsanto Chemical Company (MMK)
Nippon Cooper Kabushiki Kaisha
Nomix Manufacturing Company Limited
Nomix plc
Oxford Glycosystems Limited (OGS)
Ryowa K. K.
Taikomenban Kogyo
Tsukuba Service Company, Ltd.

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Petitioners,

v.

United States of America, South Carolina Department of Health and Environmental Control,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Monsanto Company, Allied-Signal, Inc. and EM Industries, Inc. respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B) is reported as *United States* v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). The opinion of the district court (App. E) is reported in *United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D. S.C. 1984).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 7, 1988. A timely petition for rehearing and suggestion for rehearing in banc was denied on December 2, 1988 by a 5 to 4 vote of the sitting judges, two having recused themselves (App. A). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V

No person shall be . . . deprived of . . . property, without due process of law. . . .

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed . . . .

CERCLA Section 107(a)

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section. . .

> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . .
>
> . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> > (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;
> >
> > (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

CERCLA Section 113(f)(1), (2)

(1) CONTRIBUTION.—Any person may seek contribution from any other person who is liable or

potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

(2) SETTLEMENT.—A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

STATEMENT OF THE CASE

I. The Legal Questions Presented

This is an appeal from a judgment holding Monsanto Company, Allied-Signal, Inc. and EM Industries, Inc. (the "generator defendants" or "petitioners") jointly and severally liable to the United States and South Carolina (collectively called the "governments") under Section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607(a)(3)(Supp. IV 1986), for response costs arising from the release or threat of release of hazardous substances from the Bluff Road hazardous waste storage facility. It is one of the first test cases to determine the scope of CERCLA liability under a confusing and poorly drafted statute. The decision below involved (1) the substantive standards of liability under that Act, (2) two procedural issues and (3) difficult constitutional questions.

Despite the importance of all these questions, petitioners seek review of only two closely related procedural issues. If these two issues are correctly resolved, the harshness of the lower court's substantive holdings can be mitigated and difficult constitutional issues otherwise presented avoided.

The first procedural issue is clear cut: Whether CERCLA preempts the Federal Rules of Civil Procedure and principles of equity applicable to actions for restitution so as to give a district court discretion to enter final judgment against a defendant for all cleanup costs the plaintiff has incurred without any adjustments in the award for the share of responsibility of the plaintiff and those who settled with the plaintiff. The decision below not only departs from the long-standing principle that in an equitable proceeding the court will decide all matters in dispute and decree complete relief, but it is also directly contrary to congressional intent as reaffirmed in the 1986 amendments to CERCLA. There Congress rejected an amendment sponsored by the Government that would have preempted the Federal Rules of Civil Procedure and the normal rules of equity and substituted compulsory bifurcation of CERCLA liability and allocation issues. Congress instead mandated in new CERCLA § 113(f)(1) continued adherence to the Federal Rules of Civil Procedure and specifically authorized defendants to seek contribution "during or following" a CERCLA § 107 action.

The second procedural issue is also clear cut. The court below held that Section 433A of the *Restatement (Second) of Torts* sets forth the uniform federal "common law" rule for application of joint and several liability under CERCLA. That section contemplates that the burden of proof as to apportionment will be determined by Section 433B. Section 433B in turn provides that the burden is normally upon the plaintiff, with two exceptions. One exception, clause (2), provides that where actions of the defendant and others contributed to the plaintiff's harm and the defendant seeks to limit his liability, the defendant has the burden. But comment *d* in the *Restatement* makes it clear that the exception in clause (2) is applicable only where the plaintiff is "entirely innocent." In the context of CERCLA, this is where the plaintiff is not himself a "potentially responsible party" under CERCLA because he did not also contribute to the harm remedied by

the cleanup. The court below took the half of the *Restatement* rule which defines who can be held jointly and severally liable but failed to follow the second half which lays down who has the burden of proof. Yet under Section 433B, it is clear that because the governments' wastes also contributed to the harm remedied, the burden was upon the plaintiff governments to prove defendant generators' apportioned contribution to the harm. Thus, the courts below erred in holding that the burden of proof of apportionment was on the generator defendants.

If left standing, the precedents below pose substantial problems in a number of ongoing cases. First, they will substantially increase the likelihood that the ultimate incidence of CERCLA's retroactive liability will be unfair and perhaps so grossly disproportionate in some instances as to be unconstitutional. Second, because the Fourth Circuit's positions on apportionment of CERCLA liability are fundamentally inconsistent with that taken by district courts in the First, Second, Third, Seventh, Ninth and Tenth Circuits, also seeking a uniform CERCLA "federal common law" rule, the decision below portends an impending split among the circuits.

II. Their Factual and Procedural Context

Both questions presented arise out of the cleanup of the Bluff Road site, a waste storage facility operated between 1972 and 1980 by industrial waste haulers licensed by South Carolina. Both governments, generator defendants, and as many as 78 other waste generators contracted with the waste haulers for disposal or treatment of their wastes. The Federal agencies that disposed of their wastes included the U.S. Environmental Protection Agency ("EPA"), the Centers for Disease Control ("CDC"), the Air Force and the Army. There is no allegation that generator defendants, the governments or any other generators violated any then-existent law or regulation through their disposal arrangements or that they were negligent in any way. Thus, all who dealt with the waste haulers were within the same class of waste generators, whether their conduct giving rise to strict liability under CERCLA is viewed as "tortious" or "innocent" in the context of the common law principles set forth in Section 433 of the *Restatement (Second) of Torts*.

The Federal Government initially filed suit against the waste haulers, seeking abatement of releases from the site under Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973 (1982 & Supp. IV 1986). South Carolina intervened as a plaintiff. Thereafter, both plaintiffs entered into a partial consent decree with one waste generator, RAD Services, Inc. ("RAD") for cleanup of 75% of the surface at the site. Under the settlement RAD was to be paid $1,597,785 for cleanup work from a Settlement Fund to be administered by South Carolina. Also, RAD agreed to contribute specified services. Separately, the plaintiffs entered into settlement agreements with twelve other waste generators. In exchange for payments to the fund, the plaintiffs released them from all claims arising out of the surface cleanup. The Government contributed $51,975 to the Settlement Fund for EPA's wastes, but nothing for the wastes of other agencies. South Carolina contributed nothing for its wastes.

These settlements grew out of the Government's investigations to identify all generators whose wastes were handled by the waste haulers. Prior to the settlements, the Government compiled a preliminary list of 75 entities that had contracted with the haulers. The Government then picked 24 from the list and proposed the allocation of the cleanup costs among them on a volumetric basis. The apportioned shares were based on the "Waste Quantity (gallons)" that the haulers' records showed had been handled for each generator, divided into the total volume of wastes handled for all those on this short list. The Government's omission of the volumes of wastes of South Carolina and 41 other identified generators who were not included on the short list thus increased the percentages attributed to those included on the short list. Under the Government's apportionment scheme, the volume allocated to Federal agencies totaled 3.07% (EPA 1.89%, the Air Force 0.57%, CDC 0.41% and the Army 0.20%). The volumes allocated to the three generator defendants were: Allied 12.23%, EM Industries 8.27% and Monsanto 1.91%. The volumes allocated to the 15 generators who then or subsequently settled with the Governments aggregated 77.5%.

The generator defendants refused to settle because (1) they maintained that their wastes were not at the site at the

time of cleanup, (2) they differed with the governments as to the appropriate interpretation of the statute and (3) the governments were not proposing to shoulder an equitable share of the cleanup costs even under their theory of liability. So the governments filed a Second Amended and Supplemental Complaint adding the three generator defendants and three additional parties. Subsequently the plaintiffs moved for partial summary judgment on the issue of each generator defendant's joint and several liability under CERCLA § 107. The court accepted the governments' theory that the plaintiffs need not show that a defendant's wastes were at the site at the time of cleanup. The court ruled that

> [a]ll they have to show was that at one time they [the defendants' wastes] were on the site. And further, that at the time of the cleanup, that waste materials like, or the same as the generator defendants was at the site. Whether it was any of the four defendant's materials or not.

Transcript of Proceedings before the Hon. Charles E. Simon, Jr., Jan. 13, 1984, at 23.

The defendants argued that the evidentiary dispute as to whether their wastes were on-site at cleanup time was also material to the joint and several liability issues of "indivisibility" and "apportionment," as well as the "causation" issue. Defendants maintained that the amount of any award against them should be reduced by the shares of contribution to the harm of the plaintiffs and those who had settled with the plaintiffs. The defendants also maintained that the burden of apportionment was the plaintiffs', not the defendants', since the plaintiffs were also equally "responsible parties" under CERCLA. The district court rejected these arguments. It held that the only joint and several liability issue was whether "the harm at the Bluff Road site was divisible." It found that "[i]f the injury is indivisible, that should be the end of the inquiry." Transcript of Proceeding before the Hon. Charles E. Simon, Jr., Jan. 13, 1984, at 83. Whether a defendant's wastes were present at the site at the time of response was immaterial under the court's theory, either to the issue of whether liability existed, or if existent, whether it should be joint and several. It was enough that wastes "like" the defendant's were there. Thus, despite the mistaken assumption of the

court of appeals, 858 F.2d at 170-71, the district court never considered whether any of the generator defendants' wastes were actually contained at the site at the time of cleanup. The lower court simply ruled that such evidence was irrelevant. Thus, the court granted partial summary judgment for plaintiffs, holding that each generator defendant was jointly and severally liable for all costs under CERCLA § 107. It refused to consider the plaintiffs' shares of responsibility for the harm remedied, requiring defendants to pursue that issue in a separate, subsequent action for contribution. It also did not reduce the judgment to reflect the plaintiffs' settlements with other potentially responsible parties. App. D.

After a later hearing on damages, the district court entered final judgment. App. D. The generator defendants appealed to the U.S. Court of Appeals for the Fourth Circuit. They argued that the lower court erred because CERCLA liability should be interpreted in light of common law principles reflected in the *Restatement (Second) of Torts*, which (1) require a plaintiff to prove, for imposition of joint and several liability, that a defendant's conduct was a substantial factor in producing the harm and (2) impose the burden of proof as to apportionment on the plaintiff, not the defendant, when the plaintiff has also contributed to the harm. Defendants also argued that the statute as so interpreted and applied to them was unconstitutional because: the court's fashioning of CERCLA liability criteria outside the scope of congressional guidelines violated separation of powers principles, and the Act as interpreted and applied to them violated constitutional constraints on retroactive and disproportionate sanctions and was also a bill of attainder. The landowners also appealed, raising issues not relevant to this petition. The Government appealed the lower court's denial of prejudgment interest.

Faced with the inconsistency of the arguments they had made below and the lower court's decision, the governments, at the appellate level, shifted their position on two key legal issues. First, they agreed that defendants could avoid liability by proving that their wastes were not at the site when cleanup commenced. But they argued that the defendants had not tendered sufficient evidence on that point to avoid summary judgment. Second, the governments also accepted the position of *Restatement (Second) of Torts* § 433A that joint and

several liability is inappropriate where "(a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." In the court below the governments had argued that the "or" should be read as if it were "and," and the lower court had accepted their argument. Again, however, the governments argued to the court of appeals that the defendants had not tendered sufficient evidence of a "reasonable basis for determining the contribution" to avoid summary judgment that they were jointly and severally liable.

After the appeal had been argued, but while the decision was still pending, the Government settled with one of the appellants, Aquair Corporation. A two to one majority of the Fourth Circuit panel approved the settlement, but made no fairness review and did not reduce the amount of the district court judgment against the remaining defendants. App. C.

Subsequently, the Fourth Circuit upheld the lower court's imposition of strict, joint and several liability on the generator defendants and the landowners and remanded with instructions to the lower court to reconsider the question of prejudgment interest. App. B. It also rejected the generator defendants' argument that where the plaintiff had also contributed to the harm, and was equally "innocent" or equally "guilty as the defendant," the plaintiff has the burden of proof as to apportionment. The court cited both Sections 433A and 433B of the *Restatement* as controlling. 858 F.2d at 172. But without explanation, the court ignored the clear intent of comment *d* to Section 433B that the burden is upon the plaintiff in such circumstances. Finally, the court observed that

> [w]e share the appellants' concern that they not be ultimately responsible for reimbursing more than their just portion of the governments' response costs. . . . Had we sat in place of the district court, we would have ruled as it did on the apportionment issue, but may well have retained the action to dispose of the contribution questions. . . . *That procedural course, however, was committed to the trial court's discretion and we find no abuse of it.* As we have stated, the defendants still have the right to sue responsible parties for contribution, and in that

> action they may assert both legal and equitable theories of cost allocation.

858 F.2d at 173 (emphasis added).

As to generator defendants' constitutional arguments, the court declined to reach the separation of powers argument, stating that it had not been raised below. And while agreeing that CERCLA applied liability retroactively for constitutional purposes, the court rejected the bill of attainder and *ex post facto* arguments on the grounds that

> [t]he existence of joint and several liability in cases of indivisible harm does not transform an otherwise constitutional obligation into one that exacts punishment. "Where there are opportunities for contribution . . . as well as for joinder or impleader of responsible parties (Fed. R. Civ. P. Rules 14, 20 and 21), it can hardly be said that imposition of joint and several liability would be unconstitutional." *Conservation Chemical*, 619 F. Supp. at 214-15.

858 F.2d at 175, n.33. The court did not address the defendants' eighth amendment and due process "proportionality" arguments, apparently because it assumed that defendants through subsequent contribution suits could mitigate or avoid any grossly disproportionate incidence of CERCLA liability.

Judge Widener dissented to upholding the lower court's dismissal of the generator defendants' request for allocation based upon their equitable right to reduction of the judgment to reflect the plaintiffs' contribution to the harm. He reasoned that a CERCLA cost recovery suit is an equitable action and that it is a universal and unvarying rule of equity that the court will decide all matters in dispute and decree complete relief. Moreover, he noted that CERCLA expressly provides that "*[a]ny person* may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title during or following any civil action under section 9606 of this title or under section 9607(a) of this title." 858 F.2d at 177 (emphasis in original). He continued:

> [S]ince the matter was brought before the district court, that court had no discretion but to decide the question. To repeat, the discretion is in the party to

> make the claim, not in the district court to defer decision. While I agree that the claims may be asserted in a separate action, if they are asserted in the main case they must be decided.

Id. (footnote omitted). He concluded: "Not only do the statute and federal procedural law require the course I have suggested, I think the interests of justice as well as judicial economy are best served by proceeding in that manner." *Id.*

On September 20, 1988, generator defendants filed a timely petition for rehearing and suggestion for rehearing in banc. They urged that in upholding the lower court's splitting of this single action for equitable restitution into two separate actions for liability and contribution, the majority opinion overlooked several important facts and law. Unless corrected, the result, could be an ultimate failure to obtain a meaningful apportionment of liability and thus needless and improper imposition on defendants of substantial, disproportionate liability under CERCLA. Such needless and unfair results could be avoided, however, if the court reversed and remanded with instructions to (a) retain jurisdiction, (b) allocate liability and (c) reflect such allocation in the amount of the final judgment.

On December 2, 1988, the court of appeals denied the suggestion for hearing en banc by a 5 to 4 vote. Judges Russell, Widener, Hall and Chapman voted to rehear the case; Judges Winter, Phillips, Murnaghan, Sprouse and Ervin voted against; and Judges Wilkinson and Wilkins disqualified themselves. App. A.

REASONS FOR GRANTING THE WRIT

SUMMARY

CERCLA is a complex, poorly drafted, statute that seeks to remedy a major, pressing social problem: the threat to public health and the environment posed by past disposal of hazardous wastes. Well over one hundred CERCLA cases are pending in district courts throughout the country. Most are long, drawn out affairs, involving many parties and complex issues of fact and law. Only a relatively few cases have reached the courts of appeals and have been decided there. This case is one of that small number. The basic approach as to CERCLA apportionment followed below is contrary to

congressional intent and inconsistent with the approach followed by district courts in other circuits.

Under long-standing equitable principles, the procedural question of mandatory bifurcation raised in this petition was erroneously decided below. It was also decided exactly opposite to congressional intent, as clarified and confirmed in the 1986 Amendments to CERCLA. At the instance of the Government, a divided Fourth Circuit panel carved out an exception to general equitable principles and the Federal Rules of Civil Procedure for CERCLA cases. If the exception is left standing, it will foster confusion in pending and future district court cases and present a serious obstacle to fair and reasonable settlement of multiple CERCLA claims.

Moreover, the mandated "two actions" procedure sanctioned by the circuit court's holding may result in the ultimate incidence of CERCLA liability on the petitioners, and many other CERCLA defendants in other similar cases, being far out of proportion to their equitable shares of CERCLA responsibility. By deferring consideration of allocation issues until after defendants have been required to reimburse plaintiff for all costs, defendants would suffer deprivation prior to the necessary statutory proportionality inquiry. Also if that ultimate incidence is many times a defendant's judicially allocated "fair share" of contribution to the harm, the result could be so disproportionate as to be punitive in effect. Thus, if this Court decides in *Kelco Disposal, Inc.* v. *Browning-Ferris Industries of Vermont, Inc.*, 845 F.2d 404 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 527 (1988), that the eighth amendment or due process clause imposes proportionality constraints on punitive damages, the end result of the procedure sanctioned by the court below could raise serious constitutional questions. Meanwhile, however, the judgment in this case will become final before the defendants' fair shares of the allocated costs have been ultimately determined in the separate contribution action. Thus defendants could be denied a meaningful, timely forum to present their proof that the liability imposed upon them retroactively under CERCLA is so grossly disproportional as to be unconstitutional under the Constitution's multiple constraints against retroactive punishment.

The burden of proof issue raised in this petition is likewise straightforward and the answer equally clear. The court below, while correctly looking to the *Restatement (Second) of Torts* for the applicable federal common law rule as to joint and several liability under CERCLA, erroneously rejected without explanation the *Restatement* rule as to who has the burden of proof of apportionment where the plaintiff also contributed to the harm for which it seeks recovery. By reversing the long-standing common law rule, the court departed from the congressional guidelines. This violated this Court's recent admonitions, based on separation of powers principles, that the rights and remedies under federal common law are for Congress alone to pronounce and, thus, where the fact or extent of congressional innovation is significantly uncertain, the courts should resolve the uncertainty against change. Since many CERCLA plaintiffs, both governmental and private, are also "potentially responsible parties" under CERCLA, the question of who has this burden also arises at many sites.

I. THE COMPULSORY TWO-ACTIONS ISSUE

A. THE MAJORITY OPINION BELOW DISREGARDED EQUITABLE PRINCIPLES BY TREATING DEFENDANTS' EQUITABLE RIGHT TO REDUCTION OF THE AMOUNT RECOVERABLE BY THE PLAINTIFFS AS A COUNTERCLAIM FOR CONTRIBUTION.

A counterclaim is a cause of action in favor of the defendant on which he might have sued the plaintiff and obtained affirmative relief in a separate action. 80 C.J.S., *Set-Off and Counterclaim* § 6 (1953) at 15. A defense by way of recoupment is not the same as an affirmative cause of action. *Basic Boats, Inc.* v. *United States*, 311 F. Supp. 596, 598 (E.D. Va. 1970). The plaintiffs' liability "is not a set-off or a counterclaim, but is an equitable reason" why they "ought not to recover" all the damages from the defendants. *Stone* v. *White*, 301 U.S. 532, 538-39 (1937).

As the plaintiffs, the governments framed this case. They presented only one set of claims—their own against the defendants. The district court took this single claim and carved out from the governments' case the defendants' partial defense based on the governments' own shares of the harm

and required that the equitable reduction for their shares take place only by way of a separate, subsequent action. In other words, the district court's action requires the defendants to satisfy the judgment in full and then bring a new, separate suit against the plaintiffs for contribution of their fair shares.

This approach is diametrically opposite the correct analysis of a defendant's claim for reduction. In another recent CERCLA § 107 case, *Mola Development Corp.* v. *United States*, No. CV 82-0819-RMT(JRx), slip op. at 2 (C.D. Cal. May 6, 1986) (App. H), the court reasoned that the plaintiff's responsibility for damages must be litigated in the case in chief:

> [A] counterclaim for indemnity or contribution is illogical. For example, if A sues B, A has the burden of proving B's liability and the amount thereof in A's case in chief. B, in its defense, might show limitations on its liability or amount thereof. *As a result, in the trial on A's complaint against B, the relative responsibility for A's loss will be litigated.* If B counterclaimed against A for indemnity or contribution, B would be making a claim against A to shift to or share with A any loss B incurs as a result of A's suit against B. However, any basis that could exist for B's counterclaim must be litigated on A's complaint and B's defenses thereto. As a result, any shifting or sharing of the loss is litigated on A's complaint and no basis exists for B's counterclaim.

(Emphasis added.) Thus, as the *Mola Development* court recognized, the plaintiff's responsibility *vel non* is an issue necessarily part of the case-in-chief. *Accord United States* v. *Hardage*, 26 Env't Rep. Cas. (BNA) 1049, 1052 (W.D. Okla. 1987).

All agree that CERCLA cost recovery and contribution actions sound in equity. But equity "does not countenance the idle ceremony" of the district court's procedural course. *Stone* v. *White*, 301 U.S. 532, 537 (1937). To avoid circuity, the courts below should have taken cognizance of the identity in interest of the EPA and the other liable agencies of the Federal Government. But they did not. Yet this Court has long recognized in parallel equitable actions that the Govern-

ment is a unitary entity and its agencies collectively and singularly are the United States Government. *E.g.*, *Stone* v. *White*, 301 U.S. at 537; *Payne* v. *Hook*, 74 U.S. 425 (1869); *see also United States* v. *Shell*, 605 F. Supp. 1064, 1082 (D. Colo., 1985), ("The United States argues that it and the Department of the Army are one and the same entity as a matter of law."), *id.* at 1083 ("The case is not unlike a common comparative negligence case where a defendant asserts that the injured plaintiff's conduct caused some or all of his own injury. Procedurally, the plaintiff is not joined as a defendant; rather the court apportions responsibility for the damages.")

The majority opinion below overlooked these traditional equitable principles, which treat reduction of the judgment according to the plaintiff's share of responsibility as a defense, not a separate claim. *Stone* v. *White*, 301 U.S. at 539.

B. The majority opinion below failed to consider the governing federal procedural law and the fact that the lower court did not make the express determination under Rule 54(b) required for a bifurcated decision. Instead, it created a *de facto* exception to the Federal Rules of Civil Procedure for CERCLA cases.

In sanctioning the mandatory bifurcation of this action, the majority opinion also ignored the clear language of the governing statutory law. First, although the majority opinion quotes the language of CERCLA § 113(f)(1) in footnote 13, it overlooks that section's command that "[s]uch claims *shall be brought in accordance with . . . the Federal Rules of Civil Procedure*, and shall be governed by Federal law." 42 U.S.C. § 9613(f)(1)(Supp. IV 1986) (emphasis added). The legislative history of this language emphasizes that courts are to resolve claims for allocation "on a case-by-case basis, taking relevant equitable considerations into account." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 3 at 19 (1985), *reprinted in* 1986 U.S. Code Cong. & Ad. News 3042.

The defendants' equitable defense was an issue in the case-in-chief and thus had to be heard before entry of final judgment. But even if defendants' equitable defense were a

"claim" within the contemplation of Section 113(f)(1), then defendants' claim was a compulsory counterclaim in the nature of recoupment. *United States* v. *Mottolo*, 605 F. Supp. 898, 910-11 (D. N.H. 1985). *Accord United States* v. *Moore*, 28 Env't Rep. Cas (BNA) 1150, 1152 (E.D. Va. 1988); *United States* v. *Nicolet, Inc.*, No. 85-3060, slip op. (E.D. Pa. Dec. 31, 1986) (available on Lexis, Genfed Library Dist file). Thus CERCLA, which expressly incorporates the Federal Rules of Civil Procedure, requires that this "claim" must be asserted in plaintiff's case rather than in a separate action. CERCLA § 113(f)(1); Fed. R. Civ. P. 13(a).

Although cross-claims and third-party actions may be accelerated or deferred at a defendant's option, under Fed. R. Civ. P. 13(a) compulsory counterclaims may not be deferred except in instances not material here. While the trial court may bifurcate its decision of issues of liability and allocation into separate phases of the same proceeding, it may not sever them and render final judgment on the former unless it makes the express determination required by Rule 54(b) "that there is no just reason for delay." The district court made no such determination here.

The decisions below permit the governments to ignore the Federal Rules and to defer, and perhaps avoid, their own equitable obligations. This is contrary to both equitable principles and CERCLA § 113(f), which was added by the 1986 amendments to "ratify" existing law. *See* H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3 at 18 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 3041; 131 Cong. Rec. S11,857 (daily ed. Sept. 20, 1985) (Statement of Sen. Thurmond).

In the course of the 1986 Amendments, EPA sought an amendment to compel the bifurcation of determinations of liability and contribution into two separate actions. EPA was initially successful in the Senate. S. 51, as reported by the Senate Environment and Public Works Committee, contained an amendment that would have precluded defendants sued under CERCLA § 107 from bringing claims for contribution until after a judgment had been entered or a settlement was reached. S. 51, 99th Cong., 1st Sess., at § 126; S. Hrng. 60, *Superfund Improvement Act of 1985*, Hearings on S. 51 and S. 494 before the Senate Committee on Environment and Public Works, 99th Cong. 1st Sess., 104-105 (Feb. 25, 1985); S. Rep.

No. 11, 99th Cong., 1st Sess., 44-45 (March 18, 1985). Subsequently, however, the Senate rejected this amendment after several senators objected to it. *See* S. Hrng. 61, *Insurance Issues and Superfund*, Hearing before the Senate Committee on Environment and Public Works, 99th Cong., 1st Sess., 21-22 (April 3, 1985) (Senator Mitchell); S. Hrng. 415, *Superfund Improvement Act of 1985*, Hearing on S. 51 before the Senate Committee on the Judiciary, 99th Cong., 1st Sess., 77-78 (June 7, 1985) (Senator Simpson); *id.* at 91 (Senator Hatch); *id.* at 99-101 (Senator Specter). In supporting the Judiciary Committee's substitute amendment on the floor, Senator Thurmond said:

> One issue addressed by these amendments is the right to contribution; that is, the right of one defendant to pursue reimbursement from codefendants. All of the expert witnesses appearing before the committee agreed that the right to contribution should be codified in order to encourage responsible parties to engage in cleanup and settlement. The committee proposal would codify that right and, *retaining current law*, would allow a judge the discretion and flexibility to best manage the contribution issues *in a law suit*.

131 Cong. Rec. S11,857 (daily ed. Sept. 20, 1985) (emphasis added).

In the bill passed by the Senate the provision reported by the Environment and Public Works Committee was deleted and the substitute sponsored by members of the Judiciary Committee adopted. This is the current CERCLA § 113(f)(1).

C. BECAUSE IT PROVIDES NO MECHANISM FOR ADJUSTING SETTLEMENT AMOUNTS, THE RULING BELOW MAY RESULT IN DEFENDANTS ULTIMATELY BEING LIABLE FOR SUBSTANTIALLY MORE THAN THEIR JUST PORTION OF RESPONSE COSTS AND AFFORD THE PLAINTIFFS DOUBLE RECOVERY. THIS COULD POSE MAJOR CONSTITUTIONAL PROBLEMS.

The majority opinion below recognized generator defendants' legitimate "concern that they not be ultimately responsible for reimbursing more than their just portion of the governments' response costs." 858 F.2d 173. The majority

was mistaken, however, in assuming that through a separate action for contribution generator defendants ultimately would be able to prevent that inequity. To the contrary, by upholding the district court's mandated separation of the liability and allocation issues into two separate actions, the majority substantially increased the likelihood that defendants will never be able to obtain sufficient contribution to avoid this disparate result.

As to claims against the governments, the majority below stated reassuringly that "any further claims against the EPA and other responsible government instrumentalities may be resolved in a contribution action pursuant to CERCLA section 113(f)." 858 F.2d 173, n.28. But as to the claims against the nongovernmental settling defendants, who obviously will bear a major portion of contribution to the harm once an allocation is made, the court of appeals expressly refused to determine the effect of such settlements on defendants' rights to contribution against them, saying it was premature. 858 F.2d 173, n.29.

Thus, the course required by the district court, and upheld by the majority below, appears to be a final judgment against the generator defendants for all the costs with no procedure available for mitigation by future contribution based on the settling nongovernmental parties' allocated responsibility for the harm. This result obtains because the contribution protection component of CERCLA § 113(f)(2) expressly provides that the effect of releases is to discharge the settling party from contribution claims. The only real question left unanswered by the court of appeals for resolution in the separate contribution action is whether the generator defendants can recover the settlors' allocated shares back from the governments.

Moreover, even the court's assumption that the defendants can obtain any contribution from the State of South Carolina in a subsequent, separate action may prove erroneous. The issues of whether Congress in CERCLA has waived, or constitutionality can waive, a state's immunity to contribution suits by private parties is currently pending before the Court in *Pennsylvania* v. *Union Gas Company*, 832 F.2d 1343 (3rd Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988), *argued*, Oct. 31, 1988. If this Court holds that such immunity has not

or could not be waived, then defendants will ultimately be forced to bear South Carolina's share. That unfair result would be precluded, however, had the lower court retained jurisdiction. By joining in the suit here, South Carolina waived its sovereign immunity to valid defenses such as recoupment and setoff. Thus, the district court could have subsequently reduced the amount of the judgment in favor of South Carolina as plaintiff by South Carolina's fair share as waste contributor. *See United States* v. *Mottolo*, 605 F. Supp. 898, 910-11 (D. N.H. 1985).

In any event, since the judgment here will have already become final without having been reduced by amounts paid in settlement, there appears to be no procedural mechanism available for giving effect to the second command of CERCLA § 113(f)(2). That command is that a settlement "reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. § 9613(f)(2) (Supp. IV 1986). If no such procedural mechanism for partially adjusting the "final judgment" exists, the substantive result would be contrary to established principles of common law and equity. *Federal Savings & Loan Insurance Corp.* v. *Reeves*, 816 F.2d 130, 137 (4th Cir. 1987) (under federal common law, partial satisfaction reduces the total for which the remaining defendants are responsible); *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 748-49 (8th Cir. 1986) *cert denied*, 108 S. Ct. 146 (1987); Uniform Comparative Fault Act § 6, 12 U.L.A. Civil Proc. & Rem. Laws 50 (Supp. 1988); *Restatement (Second) of Torts* § 885(c) (1982).

This fear is not an idle one. The district court and the Fourth Circuit majority approved settlements with other parties in this case without reducing the amount of the judgment against generator defendants. The district court entered a settlement between the United States and one defendant. *United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1010 (D. S.C. 1985) (App. F). But in its final judgment, the district court did not reduce the judgment against the generator defendants in accordance with this settlement. Likewise, after argument of this appeal, the governments settled with one of the appellants, and the Fourth Circuit panel approved the settlement without a hearing despite Judge Widener's dissent. (App. B). The subse-

quent majority opinion on the merits of the appeal neither reduced the judgment against the remaining appellants nor addressed the effect of this settlement. Yet the law requires that the effects of settlement on the liability of nonsettling joint tortfeasors be addressed. *See Ratner* v. *Sioux Natural Gas Corp.*, 719 F.2d 801, 803 (5th Cir. 1983), *appeal after remand*, 770 F.2d 512 (1985). *See also United States* v. *Moore*, 28 Env't Rep. Cas. (BNA) 1152 (E.D. Va. 1988). The entry of these settlements without such an inquiry is contrary to CERCLA, as well as the equitable principles cited in Judge Widener's dissent. In addition, the failure to reduce the amount of the final judgment against generator defendants permits the plaintiffs to obtain double recoveries. That is also contrary to equitable principles and the congressional policy reflected in CERCLA § 114(b).

Several district courts in other circuits have had occasion to determine what should be the "federal common law" as to the effect of a settlement with one responsible party under CERCLA on the liability of the remaining responsible parties in the context of a suit for contribution. In *Lyncott Corp.* v. *Chemical Waste Management, Inc.*, 690 F. Supp. 1409, 1418 (E.D. Pa. 1988), the court determined the principles of the Uniform Comparative Fault Act ("U.C.F.A.") are most consistent with CERCLA because

> [it] expressly provides for the application of comparative fault in actions based upon strict liability. . . . In addition, the U.C.F.A. avoids the inequity that might develop were non-settlers forced to absorb the total cost of shares of responsibility that are not allocable to solvent responsible parties. . . . [I]t also solves the problem of settlements involving non-monetary consideration.

(Citations omitted.) Under Section 6 of the U.C.F.A. the effect of release is that "the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation . . . ." The court accordingly held in a declaratory judgment action that a settlement between a CERCLA plaintiff and a CERCLA defendant relieved that defendant from CERCLA liability and gave it protection from contribution. Thus, that defendant's "equitable shares of the response costs, if any, must be

attributed to plaintiff in the CERCLA litigation." 690 F. Supp. at 1418. *Accord Edward Hines Lumber Co.* v. *Vulcan Materials Co.*, No. 85 C 1142, slip op. at 3, *reprinted in* Haz. Waste Lit. Rep. (Andrews) 12,055, 12,056 (N.D. Ill. 1987) (also available on LEXIS, Genfed library, Dist file) (holding that the "comparative fault rule" applies to CERCLA settlements and it "allows the non-settling defendant to offset its liability to the plaintiff by an amount proportionate to the settling defendant's responsibility"); *see also City of New York* v. *Exxon Corporation*, 697 F. Supp. 677 (S.D. N.Y., 1988) (available on LEXIS, Genfed library, Dist file) ("Under alternative contribution frameworks, the City's recovery against the remaining defendants would likely be reduced at least by the settling parties proportionate share of the fault if it turns out to be greater than the settlement amount.").

Had the Fourth Circuit required the district court to retain jurisdiction and thus control over the amount of the judgment against the defendants, then once the equitable shares of the settlors had been determined in the remanded proceedings, the district court could have reduced the amount of the judgment accordingly. The only other way to attain the same result under the "two-actions" procedure mandated here would be to enter an award for the defendants against the governments in the contribution suit in an amount reflecting the governments' and the settling defendants' shares, plus interest for the period between the two separate judgments. Unless that takes place, the two-separate-actions procedure will ultimately result in generator defendants being unfairly saddled with more of the costs than would have been imposed on them if the lower court had decided the allocation issue in a single equitable proceeding.

The Court recently granted certiorari in *Kelco Disposal Inc.* v. *Browning-Ferris Industries of Vermont, Inc.*, 845 F.2d 404 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 527 (1988). There one of the issues is whether punitive damages "amounting to more than 100 times the plaintiff's actual damages from [a] purely economic tort is excessive under the Eighth Amendment or otherwise." 57 U.S.L.W. 3390 (Dec. 6, 1988). It is possible that the Court may decide that proportionality constraints do exist under either an eighth amendment or a due process rationale. If so, then one such constraint in punitive

damages cases involving purely economic injuries may be that they cannot exceed a reasonable multiple of actual damages. Thus, if the Constitution imposes proportionality constraints on the amount of property that can be taken as punishment for tortious or criminal conduct, surely there must be at least equivalent limitations on how much property can be taken for "innocent" (non-tortious and non-criminal) conduct. Put another way, in specific factual contexts if the ultimate incidence of CERCLA liability is many times a defendant's fairly apportioned share, liability could be so grossly disproportionate as to be *punitive in effect* under a *United States* v. *Ward*, 448 U.S. 242, 248-49 (1980), and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), type analysis. There must be a point at which the nexus of a particular defendant with the harm remedied becomes so attentuated that "restitution" could no longer be said to be "equitable" and thus becomes "exaction." Where such disproportionate liability is imposed retroactively, it could hardly be said to have a "rational basis" or to be "reasonable regulation." *See Bowen* v. *Georgetown University Hospital*, __ U.S. __ , 109 S.Ct. 468, 475, 479 (1988) (Scalia, J., concurring).

Moreover, if the imposition of liability becomes so disproportionate as to be punitive in effect, it also violates multiple constitutional constraints on retroactive and disproportionate punishment. *E.g.*, *Solem* v. *Helm*, 463 U.S. 277 (1983); *McCleskey* v. *Kemp*, 481 U.S. 279, 315 (1987) ("The Eighth Amendment is not limited to capital punishment, but applies to all penalties."); *Weaver* v. *Graham*, 450 U.S. 24, 28-31 (1981); *Vuitton* v. *Spencer Handbags Corp.*, 765 F.2d 966, 972 (2nd Cir. 1985); *See also* Freeman, *Justice Powell's Constitutional Opinions*, 45 Wash. & Lee L. Rev. 411, 443-446 (1988); Freeman, *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 Bus. Law 215 (1986); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).

Also, if a CERCLA plaintiff is given discretion to shift a disproportional share of CERCLA liability to a defendant selected by him through a manipulative strategy of settlements, bifurcated, separate actions and shifts in the common law burden of proof, the potential for discrimination in the absence of constraining guidelines raises substantial due pro-

cess and equal protection questions. CERCLA damages could be imposed "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz* v. *Welch*, 418 U.S. 323, 350 (1974). *See also Bankers Life & Casualty Co.* v. *Crenshaw*, __ U.S. __, 108 S.Ct. 1645, 1655-56 (1988) (O'Connor, J., concurring); (The "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."); *Eddings* v. *Oklahoma*, 455 U.S. 104, 111 (1982); *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239 (1925) ("The defendant attempts to distinguish those cases [*United States* v. *Cohen Grocery Co.*, 255 U.S. 81 and *Weeds Inc.* v. *United States*, 255 U.S. 109] because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction . . . was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings.") (citations omitted.)

Both the Fourth Circuit below, and the *Conservation Chemical* court which it quoted, implicitly recognized that if the ultimate incidence of CERCLA liability were unlimited, serious constitutional problems would be presented:

> The existence of joint and several liability in cases of indivisible harm does not transform an otherwise constitutional obligation into one that exacts punishment. "Where there are opportunities for contribution . . . as well as for joinder or impleader of responsible parties (Fed. R. Civ. P. Rules 14, 20 and 21), it can hardly be said that imposition of joint and several liability would be unconstitutional." *Conservation Chemical*, 619 F. Supp. at 214-15.

858 F.2d at 175, n.33.

But because it *assumed* that the defendants would be able to avoid grossly disproportionate liability through a subsequent suit for contribution, the Fourth Circuit did not address the eighth amendment and due process arguments based on

the combined effects of disproportionality and retroactivity. It also used that optimistic assumption to reject generator defendants' *ex post facto* and attainder arguments. But from hindsight, the court's assumption may prove false. To forestall such a consequence, the statutory allocation of CERCLA liability should precede the entry of final judgment in this CERCLA § 107 suit.

The procedural problems posed here are by no means confined to this particular case. Since the Fourth Circuit is the first circuit court of appeals to speak to these issues, the precedents may spread to other circuits as the Government seeks to obtain from the courts what Congress denied it in the 1986 CERCLA Amendments. Moreover, the two-separate-actions approach upheld by the Fourth Circuit is inconsistent with the approaches taken by district courts in the First, Second, Third, Seventh, Ninth and Tenth Circuits in the *Mottolo*, *Exxon*, *Lyncott*, *Mola*, *Hines Lumber*, *Hardage* and *Shell* cases cited above and thus portends a serious impending split among the circuits.

II. THE BURDEN OF PROOF ISSUE

The court below stated that the *Restatement (Second) of Torts* represents "the correct and uniform federal rules applicable to CERCLA cases." 858 F.2d at 172. But that court ignored the statements in the *Restatement* as to who has the burden of proof. Comment *g* to Section 433A states that "[a]s to the burden of proof, and the effect of failure to produce evidence justifying the apportionment, see § 433B." Subsection 2 of Section 433B lays down a general rule that

> [w]here the tortious conduct of two or more actors has combined to bring out the harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

But comment *d* makes it clear that shifting the burden to the defendant under this rule is predicated upon his being in a *class different from the plaintiff*. Comment *d* explains that

> [t]he reason for the exceptional rule placing the burden of proof as to apportionment upon the

> defendant or defendants is the injustice of allowing a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability merely because the harm which he has inflicted has combined with similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned. In such a case, the defendant may justly be required to assume the burden of producing that evidence, or if he is not able to do so, of bearing the full responsibility. *As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.*

(Emphasis added.)

Here the plaintiffs, the Government and South Carolina, were in the same class as the generator defendants—all had contracted with the same transporters for disposal of their hazardous wastes. Under their own theory of the case, which the court of appeals adopted, the governments and the generator defendants had all contributed to the harm. Moreover, the plaintiffs offered no proof as to any differences in the qualitative conduct or the wastes of the generator defendants and their own agencies that would avoid this shift of the burden of proof back to the plaintiffs under the logic of comment *d*. Thus, under no circumstances could the governments be characterized as "entirely innocent plaintiff[s]" as compared to the defendants within the contemplation of comment *d*. For that reason, the governments could not avail themselves of the Subsection (2) exception and were instead subject to the general rule of Section 433B that:

> (1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.

Additionally, *Restatement* comment *e* on Section 433B (2) sounds a caveat that would be applicable to the situation here even if the plaintiffs were not within the same class of

responsible parties as the generator defendants and thus were "entirely innocent" as contemplated in comment *d*. Comment *e* states:

> The cases thus far decided in which the rule stated in Subsection (2) has been applied all have involved a small number of tortfeasors, such as two or three. The possibility arises that there may be so large a number of actors, each of whom contribute a relatively small and insignificant part to the total harm, that the application of the rule may cause disproportionate hardship to defendants. Thus if a hundred factories each contribute a small, but still uncertain, amount of poilution to a stream, to hold each of them liable for the entire damage because he cannot show the amount of his contribution may perhaps be unjust. Such cases have not arisen, possibly because in such cases some evidence limiting the liability always has been in fact available.

This comment on when the burden of proof should shift is based upon what is fair in light of the relative conduct of the parties and their potential access to the facts necessary for apportionment. Usually, where the wastes of multiple generators are involved, the Government will, because of its broad investigative powers and its resources, be in a better position to marshall the facts relative to apportionment. That clearly was the case here where the Government identified a large list of all who had dealt with the waste transporters, marshalled the facts as to volumes of waste disposed of by each and, indeed, settled with a substantial number of generators on a volumetric apportionment basis.

The court of appeals acknowledged the applicability of Section 433B to CERCLA actions but then failed to apply it. It inexplicably gave no reason for accepting Section 433A and rejecting the generator defendants' arguments on the applicability of Section 433B. Its failure to follow Section 433B, by reversing the burden of proof on the apportionment issue, compounds the problems for petitioners posed by the court's other procedural error in upholding the lower court's mandatory bifurcation of the liability and allocation issues into two separate suits.

Congress in CERCLA did not spell out the criteria for when and under what circumstances joint and several liability could be imposed under CERCLA. In the absence of statutory guidance, most courts have turned to its legislative history and fastened on to the statement of one of the principal sponsors of the Senate compromise bill that became the law that the applicability of joint and several liability was to be governed by "traditional and evolving principles of common law." 126 Cong. Rec. 30932 (1980) (statement of Sen. Randolph). Many courts, like the court of appeals below, have looked to the *Restatement (Second) of Torts* for the applicable common law principles.

The court of appeals' unexplained rejection of those principles as reflected in Section 433A and B's rule as to the burden of proof departs from the Congressional guidance. This freewheeling judicial creation of federal substantive and procedural law is counter to the teaching of a number of recent decisions of this Court. *See, e.g., California* v. *Sierra Club*, 451 U.S. 287 (1981); *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Texas Industries* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Universities Research Assoc., Inc.* v. *Coutu*, 450 U.S. 754 (1981); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). These opinions are not "constitutional;" they concern policies of statutory construction and judicial decisionmaking. Yet those policies are grounded in the constitutional structure of separation of powers. They call for an approach to statutory construction that curtails open-ended legislative delegations and avoids unguided judicial resolution of important questions of public policy. They teach that where the fact or extent of congressional innovation is significantly uncertain, the courts should resolve the uncertainty against change. Here the departure from separation of powers principles was much greater than the situations discussed in the above cases. The *Restatement* is clear and unambiguous on the burden of proof issue and it undoubtedly embodies "the common law." Thus the court below was not acting in the face of a "vacuum" or "gap" and forced to create "interstitial law." It simply ignored the common law

and, at the instance of the plaintiffs, substituted its own notion as to what the law ought to be.

In other contexts, the Government has sharply criticized attempts to undermine traditional common law constraints on the applicability of joint and several liability by shifting the burden of proof. A recent Justice Department report specifically noted that

> in the past decade there has been a veritable explosion of tort liability in the United States . . . . [One of its principal causes has been] [t]he undermining of causation through a variety of questionable practices and doctrines which shift liability to "deep pocket" defendants even though they did not cause the underlying injury or had only a limited or tangential involvement.

United States Department of Justice, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*, at 2. (February, 1986) The *Report* went on to say that one

> means that has been used to undermine causation—increasingly common in toxic torts cases—is the use of presumptions or burden-shifting techniques to force the defendant to prove the lack of causation in order to avoid liability. Frequently, this amounts to asking the defendant to meet an impossible burden of proving the negative.

Id. at 34-35.

Since the Government is perhaps the largest waste generator in the country and its wastes are present at many CERCLA sites, this question of who has the burden of proof is pertinent in many CERCLA cases. Moreover, many other CERCLA plaintiffs beside the Government have also contributed to the harm or threat of harm at sites they have cleaned up and for which they in turn seek cost recovery under CERCLA § 107(a). This Court's reaffirmation of the *Restatement's* common law rule as to who has the burden of proof in determining whether joint and several liability is appropriate is needed to put the CERCLA liability regime back within the congressional guidelines. Such a decision would also reinforce this Court's recent admonitions to the lower federal courts to avoid free wheeling, unguided, creation of federal rights and remedies.

CONCLUSION

The questions presented here are important to the ongoing administration of CERCLA and merit certiorari. The decision upholding mandatory bifurcation of CERCLA liability and allocation issues into two separate actions was directly contrary to congressional intent. It is also inconsistent with the basic approach to CERCLA allocation issues taken in key test cases by district courts in at least six other circuits. The position taken below as to the burden of proof as to apportionment was contrary to common law principles and thus inconsistent with congressional guidance. This unguided creation of federal common law by the court of appeals violated this Court's recent, repeated admonitions to the lower courts to adhere to separation of powers principles in resolving questions of statutory construction.

Because of the vast number of CERCLA cases now pending in the courts and the inordinate length of time involved in their appeals, timely and definite resolution of the two procedural questions by this Court will afford multiple courts the timely guidance needed. Moreover, swift resolution of these issues can avoid the difficult constitutional questions that could otherwise arise once the ultimate incidence of CERCLA liability upon these defendants becomes knowable after allocation takes place in the separate contribution proceedings mandated below.

Respectfully submitted,

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February 23, 1989

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
DEC 2 1988
U.S. Courts of Appeals
Fourth Circuit

No. 86-1261(L)
No. 86-1263
No. 86-1265

United States of America, et al., *Appellees,*

versus

Monsanto Company, et al., *Appellants,*

and

South Carolina Recycling and Disposal, Inc., et al., *Defendants.*

On Petition for Rehearing with Suggestion for Rehearing In Banc.

The appellants' petitions for rehearing and suggestions for rehearing in banc were submitted to this Court.

In a requested poll of the Court on the suggestions for rehearing in banc, Judges Russell, Widener, Hall and Chapman voted to rehear the case in banc; and Chief Judge Winter and Judges Phillips, Murnaghan, Sprouse and Ervin voted against in banc rehearing. Judge Wilkinson and Judge Wilkins disqualified themselves from voting.

As the panel considered the petitions for rehearing and a majority is of the opinion that they should be denied, and as a majority of the active circuit judges participating voted to deny rehearing in banc;

IT IS ADJUDGED AND ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Widener, Judge Sprouse and Judge Ervin.

For the Court,

/s/ JOHN M. GREACEN

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1261

UNITED STATES OF AMERICA; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Plaintiffs-Appellees

v.

MONSANTO COMPANY;
ALLIED CORPORATION;
E. M. INDUSTRIES, INC.;

Defendants-Appellants

AMERICAN INSURANCE ASSOCIATION;
CHEMICAL MANUFACTURERS ASSOCIATION

Amici Curiae

and

SOUTH CAROLINA RECYCLING AND DISPOSAL, INC.; COLUMBIA ORGANIC CHEMICAL COMPANY; OSCAR SEIDENBERG; HARVEY HUTCHINSON; EATON CORPORATION; RAD SERVICES, INC.; AQUAIR CORPORATION;

Defendants

v.

G. D. SEARLE & COMPANY;
WILL ROSS, INC.

Third Party Defendants

No. 86-1263

UNITED STATES OF AMERICA; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Plaintiffs-Appellees

v.

OSCAR SEIDENBERG; HARVEY HUTCHINSON;

Defendants-Appellants

AMERICAN INSURANCE ASSOCIATION; CHEMICAL MANUFACTURERS ASSOCIATION

Amici Curiae

and

MONSANTO COMPANY; ALLIED CORPORATION; AQUAIR CORPORATION; E. M. INDUSTRIES, INC.; SOUTH CAROLINA RECYCLING AND DISPOSAL, INC.; COLUMBIA ORGANIC CHEMICAL COMPANY; EATON CORPORATION; RAD SERVICES, INC.

Defendants

v.

G. D. SEARLE & COMPANY; WILL ROSS, INC.

Third Party Defendants

No. 86-1265

UNITED STATES OF AMERICA

Plaintiff-Appellant

and

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Plaintiff

v.

MONSANTO COMPANY; ALLIED CORPORATION; E. M. INDUSTRIES, INC., SOUTH CAROLINA RECYCLING AND DISPOSAL, INC.; OSCAR SEIDENBERG; HARVEY HUTCHINSON;

Defendants-Appellees

AMERICAN INSURANCE CORPORATION; CHEMICAL MANUFACTURERS ASSOCIATION

Amici Curiae

and

COLUMBIA ORGANIC CHEMICAL COMPANY; EATON CORPORATION; RAD SERVICES, INC.; AQUAIR CORPORATION

Defendants

v.

G. D. SEARLE & COMPANY; WILL ROSS, INC.

Third Party Defendants

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., Senior United States District Judge. (CA-80-1274-6).

Argued: October 8, 1987 Decided: September 7, 1988

Before WIDENER, SPROUSE, and ERVIN, Circuit Judges.

George Clemon Freeman, Jr. (William F. Kennedy; Alfred R. Light; Thomas E. Knauer; Hunton & Williams on brief); Isadore S. Bernstein (Hammer & Bernstein on brief) for Appellants; David Carlisle Shilton, Department of Justice (F. Henry Habicht, II, Assistant Attorney General; Myles E. Flint, Deputy Assistant Attorney General; Vinton D. Lide, United States Attorney; Mary G. Slocum, Assistant United States Attorney; Jacques B. Gelin, Department of Justice; Walton J. McLeod, III, General Counsel, South Carolina Department of Health & Environmental Control; Charles De Saillan; Dov Weitman, Environmental Protection Agency on brief) for Appellees; (Edward W. Warren; David G. Norell; Amy R. Sabrin; Kirkland & Ellis; David F. Zoll; Barbara A. Hindin on brief) for Amicus Curiae Chemical Manufacturers Association; (Thomas W. Brunner; Laura A. Foggan; Piper & Marbury on brief) for Amicus Curiae American Insurance Association.

SPROUSE, Circuit Judge:

Oscar Seidenberg and Harvey Hutchinson (the site-owners) and Allied Corporation, Monsanto Company, and EM Industries, Inc. (the generator defendants),[1] appeal from the district court's entry of summary judgment holding them liable to the United States and the State of South Carolina (the governments) under section 107(a) of the Comprehensive

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[1]Originally a named generator defendant in this case, Aquair Corporation has entered into a settlement agreement with the plaintiffs.

Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C.A. § 9607(a) (West Supp. 1987). The court determined that the defendants were liable jointly and severally for $1,813,624 in response costs accrued from the partial removal of hazardous waste from a disposal facility located near Columbia, South Carolina. The court declined, however, to assess prejudgment interest against the defendants. We affirm the district court's liability holdings, but we vacate and remand for reconsideration its denial of prejudgment interest.

I.

In 1972, Seidenberg and Hutchinson leased a four-acre tract of land they owned to the Columbia Organic Chemical Company (COCC), a South Carolina chemical manufacturing corporation. The property, located along Bluff Road near Columbia, South Carolina, consisted of a small warehouse and surrounding areas. The lease was verbal, on a month-to-month basis, and according to the siteowners' deposition testimony, was executed for the sole purpose of allowing COCC to store raw materials and finished products in the warehouse. Seidenberg and Hutchinson received monthly lease payments of $200, which increased to $350 by 1980.

In the mid-1970s, COCC expanded its business to include the brokering and recycling of chemical waste generated by third parties. It used the Bluff Road site as a waste storage and disposal facility for its new operations. In 1976, COCC's principals incorporated South Carolina Recycling and Disposal Inc. (SCRDI), for the purpose of assuming COCC's waste-handling business, and the site-owners began accepting lease payments from SCRDI.

SCRDI contracted with numerous off-site waste producers for the transport, recycling, and disposal of chemical and other waste. Among these producers were agencies of the federal government and South Carolina,[2] and various private

[2]The federal instrumentalities that contracted with SCRDI included the Environmental Protection Agency, the Army, the Air Force, and the Center for Disease Control. The South Carolina

entities including the three generator defendants in this litigation. Although SCRDI operated other disposal sites, it deposited much of the waste it received at the Bluff Road facility. The waste stored at Bluff Road contained many chemical substances that federal law defines as "hazardous."

Between 1976 and 1980, SCRDI haphazardly deposited more than 7,000 fifty-five gallon drums of chemical waste on the four-acre Bluff Road site. It placed waste laden drums and containers wherever there was space, often without pallets to protect them from the damp ground. It stacked drums on top of one another without regard to the chemical compatibility of their contents. It maintained no documented safety procedures and kept no inventory of the stored chemicals. Over time many of the drums rusted, rotted, and otherwise deteriorated. Hazardous substances leaked from the decaying drums and oozed into the ground. The substances commingled with incompatible chemicals that had escaped from other containers, generating noxious fumes, fires, and explosions.

On October 26, 1977, a toxic cloud formed when chemicals leaking from rusted drums reacted with rainwater. Twelve responding firemen were hospitalized.[3] Again, on July 24, 1979, an explosion and fire resulted when chemicals stored in glass jars leaked onto drums containing incompatible substances. SCRDI's site manager could not identify the substances that caused the explosion, making the fire difficult to extinguish.

In 1980, the Environmental Protection Agency (EPA) inspected the Bluff Road site. Its investigation revealed that the facility was filled well beyond its capacity with chemical waste. The number of drums and the reckless manner in which they were stacked precluded access to various areas in the site. Many of the drums observed were unlabeled, or their labels had become unreadable from exposure, rendering it

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Department of Health and Environmental Control also contracted with SCRDI for waste disposal.

[3]This incident sparked substantial publicity, and the siteowners concede that as of June 1977 they were aware of hazardous waste disposal activities taking place on their Bluff Road property.

impossible to identify their contents. The EPA concluded that the site posed "a major fire hazard."

Later that year, the United States filed suit under section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973, against SCRDI, COCC, and Oscar Seidenberg. The complaint was filed before the December 11, 1980, effective date of CERCLA, and it sought only injunctive relief. Thereafter, the State of South Carolina intervened as a plaintiff in the pending action.

In the course of discovery, the governments identified a number of waste generators, including the generator defendants in this appeal, that contracted with SCRDI for waste disposal. The governments notified the generators that they were potentially responsible for the costs of cleanup at Bluff Road under section 107(a) of the newly-enacted CERCLA. As a result of these contacts, the governments executed individual settlement agreements with twelve of the identified off-site producers. The generator defendants, however, declined to settle.

Using funds received from the settlements, the governments contracted with Triangle Resource Industries (TRI) to conduct a partial surface cleanup at the site. The contract required RAD Services, Inc., a subsidiary of TRI, to remove 75% of the drums found there and to keep a log of the removed drums. RAD completed its partial cleanup operation in October 1982. The log it prepared documented that it had removed containers and drums bearing the labels or markings of each of the three generator defendants.

The EPA reinspected the site after the first phase of the cleanup had been completed. The inspection revealed that closed drums and containers labeled with the insignia of each of the three generator defendants remained at the site. The EPA also collected samples of surface water, soil, and sediment from the site. Laboratory tests of the samples disclosed that several hazardous substances[4] contained in the waste the

[4]The term "hazardous substance" is defined in section 101(14) of the CERCLA, 42 U.S.A. § 9601(14) (West Supp. 1987). The definition incorporates by reference the substances listed as hazard-

generator defendants had shipped to the site remained present at the site.[5]

Thereafter, South Carolina completed the remaining 25% of the surface cleanup. It used federal funds from the Hazardous Substances Response Trust Fund (Superfund), 42 U.S.C. § 9631, as well as state money from the South Carolina Hazardous Waste Contingency Fund, S.C. Code Ann. § 44-56-160, and in-kind contribution of other state funds to match the federal contribution.

In 1982, the governments filed an amended complaint, adding the three generator defendants and site-owner Harvey Hutchinson, and including claims under section 107(a) of CERCLA against all of the nonsettling defendants. The governments alleged that the generator defendants and site-owners were jointly and severally liable under section 107(a) for the costs expended completing the surface cleanup at Bluff Road.

In response, the site-owners contended that they were innocent absentee landlords unaware of and unconnected to the waste disposal activities that took place on their land. They maintained that their lease with COCC did not allow COCC (or SCRDI) to store chemical waste on the premises, but they admitted that they became unaware of waste storage in 1977 and accepted lease payments until 1980.

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ous or toxic under the Clean Water Act, 33 U.S.C.A. §§ 1317(a), 1321(b)(2)(a) (West 1986), the Clean Air Act, 42 U.S.C. § 7412(b), the Resource Conservation and Recovery Act of 1976, 42 U.S.C.A., § 6921 (West 1983 & Supp. 1987), and the Toxic Substances Control Act, 15 U.S.C. § 2606. Section 102(a) of CERCLA also authorizes EPA to list additional substances that "may present substantial danger to the public health or welfare or the environment." 42 U.S.C.A. § 9602(a) (West Supp. 1987).

[5]It is undisputed that hazardous substances of the sort contained in each of the generator defendants' waste materials were found at the site. These substances included 1,1,1-Trichloroethane, acetone, phenol, cresol (methyl phenol), chlorophenol, and 2,4-dichlorophenol.

The generator defendants likewise denied liability for the governments' response costs.[6] Among other defenses, they claimed that none of their specific waste materials contributed to the hazardous conditions at Bluff Road, and that retroactive imposition of CERCLA liability on them was unconstitutional. They also asserted that they could establish an affirmative defense to CERCLA liability under section 107(b)(3), 42 U.S.C. § 9607(b)(3), by showing that the harm at the site was caused solely through the conduct of unrelated third parties. All parties thereafter moved for summary judgment.

After an evidentiary hearing, the district court granted the governments' summary judgment motion on CERCLA liability. The court found that all of the defendants were responsible parties under section 107(a), and that none of them had presented sufficient evidence to support an affirmative defense under section 107(b).[7] The court further concluded that the environmental harm at Bluff Road was "indivisible," and it held all of the defendants jointly and severally liable for the governments' response costs. *United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984) (*SCRDI*).

As to the site-owners' liability, the court found it sufficient that they owned the Bluff Road site at the time hazardous substances were deposited there. *Id.* at 993 (interpreting 42 U.S.C.A. § 9607(a)(2) (West Supp. 1987)). It rejected their contentions that Congress did not intend to subject "innocent" landowners to CERCLA liability. The court similarly found summary judgment appropriate against the generator

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[6]Section 101(25) of CERCLA provides that "'respond' or 'response' means remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C.A. § 9601(25) (West Supp. 1987). The terms "remove" and "removal," and "remedy" and "remedial action" are in turn defined at sections 101(23) and 101(24), 42 U.S.C.A. §§ 9601 (23), (24) (West Supp. 1987).

[7]In its initial summary judgment order, the court refused to hold COCC liable for response costs. After subsequent proceedings, however, the court found that COCC was engaged in a joint venture with SCRDI and therefore shared its liability for the governments' costs. COCC has not appealed from that ruling.

defendants because it was undisputed that (1) they shipped hazardous substances to the Bluff Road facility; (2) hazardous substances "like" those present in the generator defendants' waste were found at the facility; and (3) there had been a release of hazardous substances at the site. *SCRDI*, 653 F. Supp. at 991-93 (interpreting 42 U.S.C.A. § 9607(a)(3) (West Supp. 1987)). In this context, the court rejected the generator defendants' arguments that the governments had to prove that their specific waste contributed to the harm at the site, and it found their constitutional contentions to be "without force." *SCRDI*, 653 F. Supp. at 992-93, 995-98. Finally, since none of the defendants challenged the governments' itemized accounting of response costs, the court ordered them to pay the full $1,813,624 that had been requested. *Id.* at 1009, 1014. It refused, however, to add prejudgment interest to the amount owed. *Id.* at 1009. This appeal followed.

II.

The site-owners and the generator defendants first contest the imposition of CERCLA liability *vel non*, and they challenge the propriety of summary judgment in light of the evidence presented to the trial court. The site-owners also reassert the "innocent landowner" defense that the district court rejected, and claim that the court erroneously precluded them from presenting evidence of a valid affirmative defense under section 107(b)(3), 42 U.S.C. § 9607(b)(3). The generator defendants likewise repeat their arguments based on the governments' failure to establish a nexus between their specific waste and the harm at the site. They also claim that the trial court ignored material factual issues relevant to affirmative defenses to liability. We address these contentions sequentially, but pause briefly to review the structure of CERCLA's liability scheme.

In CERCLA, Congress established "an array of mechanisms to combat the increasingly serious problem of hazardous substance releases." *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1078 (1st Cir. 1986).[8]

[8]As one district court has stated, the statute provides the federal government with "the tools necessary for a prompt and effective

Section 107(a) of the statute sets forth the principal mechanism for recovery of costs expended in the cleanup of waste disposal facilities. At the time the district court entered judgment,[9] section 107(a) provided in pertinent part:

> (a) Covered persons; scope
>
> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> . . . .
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, [and]
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatement, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan.

42 U.S.C.A. § 9607(a) (West Supp. 1987).

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response to problems of national magnitude resulting from hazardous waste disposal," and it evinces congressional intent "that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility of remedying the harmful conditions they created." *United States* v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

[9]Congress amended section 107(a) in 1986, Pub. L. No. 99-499, 100 Stat. 1628-30, 1692, 1693, 1705-06 (1986), but the changes are not material to the issues presented in this part of the appeal.

In our view, the plain language of section 107(a) clearly defines the scope of intended liability under the statute and the elements of proof necessary to establish it.[10] We agree with the overwhelming body of precedent that has interpreted section 107(a) as establishing a strict liability scheme.[11] Further, in light of the evidence presented here, we are persuaded that the district court correctly held that the governments satisfied all the elements of section 107(a) liability as to both the siteowners and the generator defendants.

A. Site-Owners' Liability

In light of the strict liability imposed by section 107(a), we cannot agree with the site-owners contention that they are not within the class of owners Congress intended to hold liable. The traditional elements of tort culpability on which the site-owners rely simply are absent from the statute. The plain language of section 107(a)(2) extends liability to owners of

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[10]Many courts have provided succinct analyses of CERCLA's legislative history, *see generally Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080-82 (1st Cir. 1986); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1039-42 (2d. Cir. 1985); *United States* v. *Shell Oil Co.*, 605 F. Supp. 1064, 1068-79 (D. Colo. 1985), which are instructive but need not be repeated here because of the clarity of the liability provisions at issue. *See Blum* v. *Stenson*, 465 U.S. 886, 896 (1984) ("Where . . . resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.").

[11]*See e.g.*, *Levin Metals Corp.* v. *Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316 (9th Cir. 1986); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *Violet* v. *Picillo*, 648 F. Supp. 1283, 1290 (D.R.I. 1986) (and cases cited therein); *see also United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987) (dictum).

In addition to the unanimous judicial viewpoint that Congress intended CERCLA liability to be strict, we observe that CERCLA section 101(32), 42 U.S.C.A. § 9601(32) (West Supp. 1987), provides that the standard of liability applicable to CERCLA actions shall be that which governs actions under section 311 of the Clean Water Act, 33 U.S.C. § 1321. In *Steuart Transportation Co.* v. *Allied Towing Corp.*, 596 F. 2d 609, 613 (4th Cir. 1979), we held that the standard of liability under section 311 is strict liability.

waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste.

Under section 107(a)(2), *any* person who owned a facility at a time when hazardous substances were deposited there may be held liable for all costs of removal or remedial action if a release or threatened release[12] of a hazardous substance occurs. The site-owners do not dispute their ownership of the Bluff Road facility, or the fact that releases occurred there during their period of ownership. Under these circumstances, all the prerequisites to section 107(a) liability have been satisfied.[13] *See Shore Realty*, 759 F.2d at 1043-44 (site-owner

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[12]The statute defines "release" to include "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." 42 U.S.C.A. § 9601(22) (West Supp. 1987).

[13]The site-owners' relative degree of fault would, of course, be relevant in any subsequent action for contribution brought pursuant to 42 U.S.C.A. § 9613(f) (West Supp. 1987). Congress, in the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, § 113, 100 Stat. 1613, 1647 (1986) [hereafter SARA], established a right of contribution in favor of defendants sued under CERCLA section 107(a). Section 113(f)(1) provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

42 U.S.C.A. § 9613(f) (West Supp. 1987). The legislative history of this amendment suggests that in arriving at an equitable allocation of costs, a court may consider, among other things, the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of hazardous substances. H.R. Rep. No. 253

held liable under CERCLA section 107(a)(1) even though he did not contribute to the presence or cause the release of hazardous substances at the facility.)[14]

The site-owners nonetheless contend that the district court's grant of summary judgment improperly denied them the opportunity to present an affirmative defense under section 107(b)(3). Section 107(b)(3) sets forth a limited affirmative defense based on the complete absence of causation. *See Shore Realty*, 759 F.2d at 1044. It requires proof that the release or threatened release of hazardous substances and resulting damages were caused solely by "a third party other than . . . one whose act or ommission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . ." 42 U.S.C. § 9607(b)(3). A second element of the defense requires proof that the defendant "took precautions against forseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." *Id.* We agree with the district court that under no view of the evidence could the site-owners satisfy either of these proof requirements.

First, the site-owners could not establish the absence of a direct or indirect contractual relationship necessary to maintain the affirmative defense. They concede they entered into a lease agreement with COCC. They accepted rent from COCC, and after SCRDI was incorporated, they accepted rent from SCRDI. *See United States* v. *Northernaire Plating Co.*, 670 F. Supp. 742, 747-48 (W.D. Mich. 1987) (owner who leased facility to disposing party could not assert affirmative defense). Second, the site-owners presented no evidence that they took precautionary action against the forseeable conduct of COCC or SCRDI. They argued to the trial court that, although they were aware COCC was a chemical manufactur-

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(III), 99th Cong., 1st Sess. 19 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 3038, 3042.

[14]Congress, in section 101(35) of SARA, acknowledged that landowners may affirmatively avoid liability if they can prove they did not know and had no reason to know that hazardous substances were disposed of on their land *at the time they acquired title or possession*. 42 U.S.C.A. § 9601(35) (West Supp. 1987). This explicitly drafted exception further signals Congress' intent to impose liability on landowners who cannot satisfy its express requirements.

ing company, they were completely ignorant of all waste disposal activities at Bluff Road before 1977. They maintained that they never inspected the site prior to that time. In our view, the statute does not sanction such willful or negligent blindness on the part of absentee owners. The district court committed no error in entering summary judgment against the site-owners.

B. Generator Defendants' Liability

The generator defendants first contend that the district court misinterpreted section 107(a)(3) because it failed to read into a statute a requirement that the governments prove a nexus between the waste they sent to the site and the resulting environmental harm. They maintain that the statutory phrase "containing such hazardous substances" requires proof that the specific substances they generated and sent to the site were present at the facility at the time of release. The district court held, however, that the statute was satisfied by proof that hazardous substances "like" those contained in the generator defendants' waste were found at the site. *SCRDI*, 653 F. Supp. at 991-92. We agree with the district court's interpretation.

Reduced of surplus language, sections 107(a)(3) and (4) impose liability on off-site waste generators who:

> "arranged for disposal . . . of hazardous substances . . . at any facility . . . *containing such hazardous substances* . . . from which there is a release . . . of a hazardous substance."

42 U.S.C.A. §§ 9607(a) (3), (4) (West Supp. 1987) (emphasis supplied). In our view, the plain meaning of the adjective "such" in the phrase "containing such hazardous substances" is "[a]like, similar, of the like kind." *Black's Law Dictionary* 1284 (5th ed. 1979). As used in the statute, the phrase "such hazardous substances" denotes hazardous substances alike, similar, or of a like kind to those that were present in a generator defendant's waste or that could have been produced by the mixture of the defendant's waste with other waste present at the site. It does not mean that the plaintiff must trace the ownership of each generic chemical compound found at a site. Absent proof that a generator defendant's specific waste remained at a facility at the time of

release, a showing of chemical similarity between hazardous substances is sufficient.[15]

The overall structure of CERCLA's liability provisions also militates against the generator defendants' "proof of ownership" argument. In *Shore Realty*, the Second Circuit held with respect to site-owners that requiring proof of ownership at any time later than the time of disposal would go far toward rendering the section 107(b) defenses superfluous. *Shore Realty*, 759 F.2d at 1044. We agree with the court's reading of the statute and conclude that its reasoning applies equally to the generator defendants' contentions. As the statute provides—"[n]otwithstanding any other provision or rule of law"—liability under section 107(a) is "subject *only* to the defenses set forth" in section 107(b). 42 U.S.C.A. § 9607(a) (West Supp. 1987) (emphasis added). Each of the three defenses[16] established in section 107(b) "carves out from liability an exception based on causation." *Shore Realty*, 759 F.2d at 1044. Congress has, therefore, allocated the burden of disproving causation to the defendant who profited from the generation and inexpensive disposal of hazardous waste. We decline to interpret the statute in a way that would neutralize the force of Congress' intent.[17]

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[15]CERCLA plaintiffs need not perform exhaustive chemical analyses of hazardous substances found at a disposal site. *See SCRDI*, 653 F. Supp. at 993 n.6. They must, however, present evidence that a generator defendant's waste was shipped to a site and that hazardous substances similar to those contained in the defendant's waste remained present at the time of release. The defendant, of course, may in turn present evidence of an affirmative defense to liability.

[16]In addition to the limited third-party defense discussed above, sections 107(b)(1) and (2) respectively allow defendants to avoid liability by proving that the release and resulting damages were "caused solely" by an act of God or an act of war. 42 U.S.C. § 9607(b)(1)(2).

[17]In fact, Congress specifically declined to include a similar nexus requirement in CERCLA. As the Second Circuit in *Shore Realty* observed, an early House version of what ultimately became section 107(a) limited liability to "any person who caused or contributed to the release or threatened release." 759 F.2d at 1044 (quoting H.R. Rep. 7020, 96th Cong., 2d Sess. § 3071(a) (1980)), *reprinted in 2 A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980* at 438.

Finally, the purpose underlying CERCLA's liability provisions counsels against the generator defendants' argument. Throughout the statute's legislative history, there appears the recurring theme of facilitating prompt action to remedy the environmental blight of unscrupulous waste disposal.[18] In deleting causation language from section 107(a), we assume as have many other courts, that Congress knew of the synergistic and migratory capacities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed waste to its source.[19] In view of this, we will not frustrate the statute's salutary goals by engrafting a "proof of ownership" requirement, which in practice, would be as onerous as the language Congress saw fit to delete. *See United States* v. *Wade*, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983) ("to require a plaintiff under CERCLA to 'fingerprint' wastes is to eviscerate the statute.").

The generator defendants next argue that the trial court ignored evidence that established genuine factual issues as to the existence of an affirmative defense to liability. They maintain that summary judgment was inappropriate because they presented some evidence that all of their waste had been removed from Bluff Road prior to cleanup. We agree with the

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As ultimately enacted after House and Senate compromise, however, CERCLA "imposed liability on classes of persons without reference to whether they caused or contributed to the release or threat of release." *Shore Realty*, 759 F.2d at 1044. The legislature thus eliminated the element of causation from the plaintiff's liability case. *Id.*; *see also United States* v. *Bliss*, 667 F. Supp. 1298, 1309 (E.D. Mo. 1987) ("traditional tort notions, such as proximate cause, do not apply"); *Violet* v. *Picillo*, 648 F. Supp. 1283, 1290-93 (D.R.I. 1986) (minimal causal nexus); *United States* v. *Conservation Chemical Co.*, 619 F. Supp. 162, 190 (W.D. Mo. 1985); *United States* v. *Wade*, 577 F. Supp. 1326, 1331-34 (E.D. Pa. 1983).

[18]The legislative history underlying the Superfund Amendments and Reauthorization Act of 1986 echoed this theme with even greater force than that underlying CERCLA's original enactment in 1980.

[19]In advancing their arduous proof requirements, the generator defendants make little mention of the fact that leaking chemicals may combine to form new compounds or escape into the atmosphere before proper response action can be taken. *See* cases cited *supra* note 17.

trial court, however, that the materials on which the generator defendants rely were insufficient to create a genuine issue of material fact.

The generator defendants offered only conclusory allegations, principally based "on information and belief," that their waste, originally deposited at Bluff Road, was at some time prior to 1979 transported from that facility to other sites operated by SCRDI.[20] To withstand summary judgment under section 107(b)(3), however, the generator defendants had to produce specific evidence creating a genuine issue that all of their waste was removed from the site prior to the release of hazardous substances there. *See* 42 U.S.C. § 9607(b)(3).[21] In light of the uncontroverted proof that containers bearing each of the defendants' markings remained present at the site at the time of cleanup and the fact that hazardous substances chemically similar to those contained in the generators' waste were found, the generator defendants' affidavits and deposi-

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[20]The generator defendants offered the following materials:

1. An officer of the company that oversaw the final cleanup at Bluff Road testified that he did not know whether drums bearing Allied's label actually contained Allied's waste when they were removed from the site.

2. An officer of EM Industries averred that SCRDI assured him prior to 1980 that none of EM Industries' waste had been deposited at Bluff Road.

3. An officer of Monsanto averred that two of his employees inspected the site in 1979, and while they "did not explore all areas of the site, upon information and belief they did not observe any drums of material taken from [Monsanto's plant]."

4. An officer of Allied averred that SCRDI's site manager at Bluff Road told him in 1979 that all of Allied's waste was removed from the site before 1977.

None of these largely second-hand allegations were supported by evidence tending to show that any of the generators' waste materials were actually taken away from the site. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient [to avoid summary judgment]; there must be evidence on which the [finder of fact] could reasonably find for the [nonmoving party]." *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2512 (1986).

[21]Had they produced such evidence, it would have created an issue as to whether the "release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . an act or omission of a third party." 42 U.S.C. § 9607(b)(3).

tion testimony simply failed to establish complete removal as a genuine issue. *See Celotex* v. *Catrett*, 477 U.S. 317 (1986) (summary judgment appropriately granted against nonmoving party who failed to produce evidence supporting an element essential to its case on which it bore burden of proof at trial).

III.

The appellants next challenge the district court's imposition of joint and several liability for the governments' response costs.[22] The court concluded that joint and several liability was appropriate because the environmental harm at Bluff Road was "indivisible" and the appellants had "failed to meet their burden of proving otherwise." *SCRDI*, 653 F. Supp. at 994. We agree with its conclusion.

While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm. *See Shore Realty*, 759 F.2d at 1042 n.13; *United States* v. *Chem-Dyne*, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983). In each case, the court must consider traditional and evolving principles of federal common law,[23] which Congress has left to the courts to supply interstitially.

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[22]The site-owners limit their joint and several liability argument to the contention that it is inequitable under the circumstances of this case, *i.e.*, their limited degree of participation in waste disposal activities at Bluff Road. As we have stated, however, such equitable factors are relevant in subsequent actions for contribution. They are not pertinent to the question of joint and several liability, which focuses principally on the divisibility among responsible parties of the harm to the environment.

[23]As many courts have noted, a proposed requirement that joint and several liability be imposed in all CERCLA cases was deleted from the final version of the bill. *See, e.g.*, *Chem-Dyne*, 572 F. Supp. at 806. "The deletion," however, "was not intended as a rejection of joint and several liability," but rather "to have the scope of liability determined under common law principles." *Id.* at 808. We adopt the *Chem-Dyne* court's thorough discussion of CERCLA's legislative history with respect to joint and several liability. We note that the approach taken in *Chem-Dyne* was subsequently confirmed as correct by Congress in its consideration of SARA's contribution provisions. *See* H.R. Rep. No. 253 (1), 99th Cong., 2d Sess., 79-90 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News at 2835, 2861-62.

Under common law rules, when two or more persons act independently to cause a single harm for which there is a reasonable basis of apportionment according to the contribution of each, each is held liable only for the portion of harm that he causes. *Edmonds* v. *Compagni Generale Transatlantique*, 443 U.S. 256, 260 n.8 (1979). When such persons cause a single and indivisible harm, however, they are held liable jointly and severally for the entire harm. *Id.* (citing Restatement (Second) of Torts § 433A (1965)). We think these principles, as reflected in the Restatement (Second) of Torts, represent the correct and uniform federal rules applicable to CERCLA cases.

Section 433A of the Restatement provides:

> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes.

Restatement (Second) of Torts § 433A (1965).

Placing their argument into the Restatement framework, the generator defendants concede that the environmental damage at Bluff Road constituted a "single harm," but contend that there was a reasonable basis for apportioning the harm. They observe that each of the off-site generators with whom SCRDI contracted sent a potentially identifiable volume of waste to the Bluff Road site, and they maintain that liability should have been apportioned according to the volume they deposited as compared to the total volume disposed of there by all parties. In light of the conditions at Bluff Road, we cannot accept this method as a basis for apportionment.

The generator defendants bore the burden of establishing a reasonable basis for apportioning liability among responsible parties. *Chem-Dyne*, 572 F. Supp. at 810; Restatement

(Second) of Torts § 433B (1965).[24] To meet this burden, the generator defendants had to establish that the environmental harm at Bluff Road was divisible among responsible parties. They presented no evidence, however, showing a relationship between waste volume, the release of hazardous substances, and the harm at the site.[25] Further, in light of the comingling of hazardous substances, the district court could not have reasonably apportioned liability without some evidence disclosing the individual and interactive qualities of the substances deposited there. Common sense counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others improperly mixed could result in disastrous consequences.[26] Under other circumstances proportionate volumes of hazardous substances may well be probative of contributory harm.[27] In this case, however, volume could not

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[24]Section 433(B)(2) of the Restatement provides:

> Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

Restatement (Second) of Torts § 433(B)(2) (1965).

[25]At minimum, such evidence was crucial to demonstrate that a volumetric apportionment scheme was reasonable. The governments presented considerable evidence identifying numerous hazardous substances found at Bluff Road. An EPA investigator reported, for example, that in the first cleanup phase RAD Services encountered substances "in every hazard class, including explosives such as crystallized dynamite and nitroglycerine. Numerous examples were found of oxidizers, flammable and nonflammable liquids, poisons, corrosives, containerized gases, and even a small amount of radioactive material." Under these circumstances, volumetric apportionment based on the overall quantity of waste, as opposed to the quantity and quality of hazardous substances contained in the waste would have made little sense.

[26]We agree with the district court that evidence disclosing the relative toxicity, migratory potential, and synergistic capacity of the hazardous substances at the site would be relevant to establishing divisibility of harm.

[27]Volumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has

establish the effective contribution of each waste generator to the harm at the Bluff Road site.

Although we find no error in the trial court's imposition of joint and several liability, we share the appellants' concern that they not be ultimately responsible for reimbursing more than their just portion of the governments' response costs.[28] In its refusal to apportion liability, the district court likewise recognized the validity of their demand that they not be required to shoulder a disproportionate amount of the costs. It ruled, however, that making the governments whole for response costs was the primary consideration and that cost allocation was a matter "more appropriately considered in an action for contribution between responsible parties after plaintiff has been made whole." *SCRDI*, 653 F. Supp. at 995 & n.8. Had we sat in place of the district court, we would have ruled as it did on the apportionment issue, but may well have retained the action to dispose of the contribution questions. *See* 42 U.S.C.A. § 9613(f) (West Supp. 1987). That procedural course, however, was committed to the trial court's discretion and we find no abuse of it. As we have stated, the defendants still have the right to sue responsible parties for contribution, and in that action they may assert both legal and equitable theories of cost allocation.[29]

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been demonstrated, that independent factors had no substantial effect on the harm to the environment. *Cf.* Restatement (Second) of Torts § 433A comment d, illustrations 4, 5 (1965).

[28]The final judgment holds the defendants liable for slightly less than half of the total costs incurred in the cleanup, while it appears that the generator defendants collectively produced approximately 22% of the waste that SCRDI handled. Other evidence indicates that agencies of the federal government produced more waste than did generator defendant Monsanto, and suggests that the amounts contributed by the settling parties do not bear a strictly proportionate relationship to the total costs of cleaning the facility. We note, however, that a substantial portion of the final judgment is attributable to litigation costs. We also observe that the EPA has contributed upwards of $50,000 to the Bluff Road cleanup, and that any further claims against the EPA and other responsible government instrumentalities may be resolved in a contribution action pursuant to CERCLA section 113(f).

[29]Contrary to the generator defendants' request, it would be premature for us to interpret the effect of settlement on the rights of

IV.

The generator defendants raise numerous constitutional challenges to the district court's interpretation and application of CERCLA. They contend that the imposition of "disproportionate" liability without proof of causation violated constitutional limitations on retroactive statutory application and that it converted CERCLA into a bill of attainder and an *ex post facto* law. They further assert, along with the site-owners, that the trial court's construction of CERCLA infringed their substantive due process rights.

The district court held that CERCLA does not create retroactive liability, but imposes a prospective obligation for the post-enactment environmental consequences of the defendants' past acts. *SCRDI*, 653 F. Supp. at 996. Alternatively, the court held that even if CERCLA is understood to operate retroactively, it nonetheless satisfies the dictates of due process because its liability scheme is rationally related to a valid legislative purpose. *Id.* at 997-98. We agree with the court's latter holding, and we find no merit to the generator defendants' bill of attainder and *ex post facto* arguments.[30]

Many courts have concluded that Congress intended CERCLA's liability provisions to apply retroactively to pre-enactment disposal activities of off-site waste generators.

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nonsettling parties in contribution actions under CERCLA section 113(f)(2), 42 U.S.C.A. § 9613(f)(2) (West Supp. 1987). We observe, however, that the possibility this subsection precludes contribution actions against settling parties signals legislative policy to encourage settlement in CERCLA cleanup actions. At the same time, we recognize that the language of CERCLA's new contribution provisions reveals Congress' concern that the relative culpability of each responsible party be considered in determining the proportionate share of costs each must bear.

[30]The generator defendants also assert, for the first time on appeal, that the district court's interpretation of CERCLA violated the separation of powers doctrine. They argue that the court's imposition of strict liability without proof of factual causation departed from Congress' intent, and that the court strayed from common-law principles in holding the defendants jointly liable. These arguments constitute little more than a repackaging of the statutory interpretation contentions we have already considered and rejected. Because we perceive no exceptional circumstances, we decline to review the separation of powers contention *de novo*.

They have held uniformly that retroactive operation survives the Supreme Court's tests for due process validity.[31] We agree with their analysis.

In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Supreme Court, in a different context, rejected a due process challenge to the retroactive operation of the liability provisions in the Black Lung Benefits Act of 1972. The Court stated that "a presumption of constitutionality" attaches to "legislative Acts adjusting the burdens and benefits of economic life," and that "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Id.* at 15. It reasoned that although the Act imposed new liability for disabilities developed prior to its enactment, its operation was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." *Id.* at 18.[32]

The reasoning of *Turner Elkhorn* applies with great force to the retroactivity contentions advanced here. While the generator defendants profited from inexpensive waste disposal methods that may have been technically "legal" prior to

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[31]*See, e.g., United States* v. *Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 732-34 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987) (*NEPACCO*); *United States* v. *Hooker Chemicals & Plastics Corp.*, No. Civ-79-990C (W.D.N.Y. Feb. 23, 1988) (Available on WESTLAW DCT database); *United States* v. *Shell Oil Co.*, 605 F. Supp. 1064, 1069-73 (D. Colo. 1985). These decisions hold that CERCLA's legislative history and the past-tense language of section 107(a) evince congressional intent to apply CERCLA retroactively.

[32]Similarly, in *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, the Court stated:

> Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.
>
> . . . .
>
> . . . [Due process is satisfied] simply by showing that the retroactive application is itself justified by a rational legislative purpose.

467 U.S. 717, 729, 730 (1984).

CERCLA's enactment, it was certainly foreseeable at the time that improper disposal could cause enormous damage to the environment. CERCLA operates remedially to spread the costs of responding to improper waste disposal among all parties that played a role in creating the hazardous conditions. Where those conditions are indivisible, joint and several liability is logical, and it works to endure complete cost recovery. We do not think these consequences are "particularly harsh and oppressive," *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 n.13 (1977) (retrospective civil liability not unconstitutional unless it is particularly harsh and oppressive), and we agree with the Eighth Circuit that retroactive application of CERCLA does not violate due process. *United States* v. *Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 734 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

Nor does the imposition of strict, joint and several liability convert CERCLA into a bill of attainder or an *ex post facto* law. *United States* v. *Conservation Chemical Co.*, 619 F. Supp. 162, 214 (W.D. Mo. 1985); *United States* v. *Tyson*, 25 Env't Rep. Cas. (BNA) 1897 (E.D. Pa. 1986). The infliction of punishment, either legislatively or retrospectively, is a *sine qua non* of legislation that runs afoul of these constitutional prohibitions. *See Nixon* v. *Administrator of General Services*, 433 U.S. 425, 473-84 (1977) (bill of attainder analysis); *Weaver* v. *Graham*, 450 U.S. 24, 28-30 (1981) (*ex post facto* law analysis). CERCLA does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent. *Cf. Tull* v. *United States*, 107 S. Ct. 1831, 1838 (1987) (distinguishing civil penalties under Clean Water Act from equitable remedy of restitution). Moreover, as this case amply demonstrates, Congress did not impose that obligation automatically on a legislatively defined class of persons.[33]

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[33]The existence of joint and several liability in cases of indivisible harm does not transform an otherwise constitutional obligation into one that exacts punishment. "Where there are opportunities for

V.

The United States contends on cross-appeal that the district court erred in denying its rquest for prejudgment interest on its response costs. At the time the court issued its decision, CERCLA contained no explicit provision for the award of prejudgment interest.[34] Since then, however, Congress has added the following language to section 107(a):

> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

42 U.S.C.A. 9607(a) (West Supp. 1987). Because of this addition to the law, we look to the Supreme Court's decision in *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), for the principles controlling application of later-enacted amendments to previously accrued statutory liability. We conclude under *Bradley* that the case must be remanded for reconsideration of the interest queston pursuant to the terms of amended statute.

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contribution . . . as well as for joinder or impleader of responsible parties (Fed. R. Civ. P. Rules 14, 20 and 21), it can hardly be said that imposition of joint and several liability would be unconstitutional." *Conservation Chemical*, 619 F. Supp. at 214-15.

[34]Although some courts had found implicit authority within section 107(e)(2), 42 U.S.C. § 9607(e)(2), for awarding interest, the district court denied the government's request, concluding that the defendants had not sought to delay the litigation and had not been recalcitrant, deceptive or unreasonable.

In *Bradley*, the Supreme Court ruled that when Congress amends a law while a case is pending on direct appeal, the general rule is that the appellate court should apply the law as amended unless so doing would result in manifest injustice or would contravene statutory direction or legislative history to the contrary.[35] *Id.* at 711; *see Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362, 365 (4th Cir.), *cert. denied*, 474 U.S. 818 (1985). Here, the language and legislative history of the 1986 amendment reveal no statutory direction or congressional intent to delay its application,[36] and the defendants have failed to demonstrate any "manifest injustice" that would arise from its immediate operation.

The generator defendants contend, however, that Congress' use of the word "shall" in the phrase "amounts recoverable . . . shall include interest" does not of itself make *the award* of interest mandatory. Following Fourth Circuit precedent, we must agree with this contention as far as it goes. *See generally United Hospital Center, Inc.* v. *Richardson*, 757 F.2d 1445, 1453 (4th Cir. 1985) ("in a proper case 'shall' may properly be construed as permissive"). We think, however, in light of CERCLA's restitutional purposes and Congress' intent to facilitate complete reimbursement, the amendment generally establishes interest as an element of recovery—"absent a convincing argument to the contrary."

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[35]In *Bradley*, the district court granted an award of attorneys fees to civil rights plaintiffs, despite the absence of explicit statutory authorization. While the case was pending on appeal before this court, Congress authorized such fee awards in the Education Act Amendments of 1972. Although a majority of the en banc court reversed the award on other grounds, *Bradley* v. *School Board*, 472 F.2d 318 (4th Cir. 1972) (en banc), Judge Winter in dissent stated that the new law should apply to cases pending on appeal. *Id.* at 335 (Winter, J. dissenting). In a unanimous reversal, the Supreme Court largely adopted the reasoning of Judge Winter's dissent.

[36]The Third Circuit in *United States* v. *Union Gas Co.*, 832 F.2d 1343 (3rd Cir. 1987), *cert. granted*, 56 U.S.L.W. 638 (March 22, 1988) recently applied another section of the 1986 Superfund Amendments to a case that was pending on appeal when the amendments were enacted. The court stated, "[t]o the extent that the added language serves to 'clarify' CERCLA, it amounts to a subsequent declaration of congressional intent that deserves great weight." *Id.* at 1350 (citing *Red Lion Broadcasting* v. *F.C.C.*, 395 U.S. 367, 380-82 (1969)).

Sterling Forest Associates v. *Barnett-Range Corp.*, No. 87-2514, slip op. at 9 (4th Cir. Feb. 26, 1988). Such an argument should be made in the first instance to the district court. Accordingly, we must remand the case for reconsideration of the interest question under the terms and purposes sought to be achieved by the amended statute.

VI.

In view of the above, the judgement of the district court as to the CERCLA liability of the site-owners and generator defendants is affirmed. The case is remanded, however, for reconsideration of the question of prejudgment interest.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in the majority opinion in all respects save its decision not to require the district court to treat the issue of allocation of costs of cleanup among the various defendants, slip op. at 27-28, and, as to that, I respectfully dissent. While it may be true that a subsequent suit for contribution may adequately apportion the damages among the defendants, I am of opinion that the district court, as a court of equity, is required to retain jurisdiction and answer that question now.

So far as I know, it is now and has been the general law without any variance that when a court of equity has jurisdiction it "will decide all matters in dispute and decree complete relief," e.g. *Alexander* v. *Hillman*, 296 U.S. 222, 242 (1935), see *Pomeroy's Equity Jurisprudence*, 3rd Ed (1905) § 181, 231, and that a court of equity should dispose of a case "so as to end litigation, not to foster it; to diminish suits, not to multiply them." *Payne* v. *Hook*, 74 U.S. 425, 432, 19 L.Ed. 260, 262 (1869). In *Payne*, a case which should control here, even if the statute does not, the Supreme Court held that once a court of equity had jurisdiction to determine liability for an estate administrator's misconduct, it also had the duty to determine the amount the sureties would pay in the event the administrator could not satisfy the judgment. In the face of the admitted liability of the sureties *in a separate action at law*, 19 L.Ed. at 262, the Court nevertheless

required the lower court *in equity* to ascertain the liability of the sureties in the same suit in order that the matter, should the administrator be unable to pay, not be ". . . turned over to a court of law, to renew the litigation with his sureties." 262 L.Ed. at 262. Thus, almost the same situation pertained in *Payne* which is present here, but with opposite result.

I see great danger in postponing the ultimate apportioning of the damages to a later day. As an example, a small generator which deposited a few gallons of relatively innocuous waste liquid at a site is jointly and severally liable for the entire cost of cleanup under this decision. And with that I agree. If that generator were readily available and solvent, however, the government might well, and probably would, proceed against him first in collecting its judgment. The vagaries of and delays in his subsequent suit for contribution might result in needless financial disaster. I do not see this as a desired or even permissible result.

The statute involved, 42 U.S.C. 9613(f)(1), provides that "*[a]ny person* may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title during or following any civil action under section 9606 of this title or under section 9607(a) of this title." (Italics added) Thus, the statute plainly provides that discretion with respect to contribution is not in the district court to consider relief or not as the majority opinion holds; rather, it is in the generator to seek relief, for "any person" certainly includes the generators of the waste. So, since the matter was brought before the district court, that court had no discretion but to decide the question.[1] To repeat, the discretion is in the party to make the claim, not in the district court to defer decision. While I agree that the claims may be asserted in a separate action, if they are asserted in the main case they must be decided.

Section 9613(f)(1) is entirely in accord with *Payne*, and I think we make a mistake of no little consequence in deciding that the district court has the discretion either to decide the matter before it or to relegate the parties to a separate suit.

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[1]In the unlikely event that there was not sufficient evidence before the district court, it should simply have required more evidence to be taken, or should on remand should my view have prevailed.

Not only do the statute and federal procedural law require the course I have suggested, I think that the interests of justice as well as judicial economy are best served by proceeding in that manner.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
AUG 30 1988
U.S. Court of Appeals
Fourth Circuit

No. 86-1261
No. 86-1263
No. 86-1265

United States of America, et al.,

Plaintiffs-Appellees,

v.

Monsanto Co., et al.,

Defendants-Appellants,

American Insurance Assoc., et al.,

Amici Curiae,

and

South Carolina Recycling
and Disposal, Inc., et al.,

Defendants,

v.

G. D. Searle & Co., et al.,

Third Party Defendants.

Appeals from the United States District Court for the District of South Carolina, at Columbia, Charles E. Simons, Jr., District Judge.

Upon consideration of the government's motion to enter consent decree and the response thereto,

IT IS ORDERED that the government's motion to enter the consent decree for response costs and dismissal of AquAir Corporation is granted.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Ervin. Judge Widener dissents.

For the Court,

/s/ JOHN M. GREACEN
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES
OF AMERICA
and
SOUTH CAROLINA
DEPARTMENT OF
HEALTH AND
ENVIRONMENTAL
CONTROL

Amended
JUDGMENT IN A CIVIL CASE

v.

SOUTH CAROLINA
RECYCLING AND
DISPOSAL, INC.;
OSCAR SEIDENBERG;
HARVEY HUTCHINSON;
MONSANTO COMPANY;
ALLIED CORPORATION;
AQUAIR CORPORATION
AND EM INDUSTRIES, INC.

CASE NO. 3:80-1274-6

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_x_ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiff, United States of America, recover of the defendants jointly and severally the sum of One Million, Five Hundred Sixty-One Thousand, One Hundred Thirty-Four Dollars and 55/100 ($1,561,134.55).

IT IS FURTHER ORDERED that the Plaintiff Intervenor, South Carolina Department of Health and Environmental

Control, recover of the defendants jointly and severally the sum of Two Hundred Fifty Two Thousand, Four Hundred Eighty Nine Dollars and 46/100 ($252,489.46).

Post-judgment interest will run at the rate of 5.63 percent.

Entered
9-23-86

FILED
Sep 23 1986

John W. Williams, Clerk
U.S. District Court

September 23, 1986	JOHN W. WILLIAMS
DATE	CLERK
By /s/ LORI F. GOLDIE	/s/ LORI F. GOLDIE
Deputy Clerk	(By) Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Plaintiff-Intervenor,

vs.

SOUTH CAROLINA RECYCLING AND DISPOSAL, INC.; COLUMBIA ORGANIC CHEMICAL COMPANY; OSCAR SEIDENBERG; HARVEY HUTCHINSON; MONSANTO COMPANY; ALLIED CORPORATION, AQUAIR CORPORATION; EATON CORPORATION; and EM INDUSTRIES, INC.,

Defendants,

vs.

G.D. SEARLE & CO., and WILL ROSS, INC.,

Third-Party Defendants

Civil Action No. 80-1274-6

ORDER

FILED
Feb. 23, 1984
John W. Williams,
Clerk
Columbia, S.C.

INTRODUCTION

This action was instituted by plaintiff United States pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9607, to recover costs of removing hazardous substances from the surface of the Bluff Road site, a hazardous waste site located near Columbia, South Carolina. Named as defendants in this action are four hazardous waste "generators", the two owners of the Bluff Road property, a lessee of at least a portion of the site, and the site operator.

Plaintiff United States has filed for partial summary judgment on the issue of each defendant's joint and several liability for costs incurred in responding to the hazardous conditions posed by the site. The generator defendants have likewise filed motions for summary judgment against plaintiff, as has Columbia Organic Chemical Company ("COCC"), a lessee of at least a portion of the site.[1]

The Federal Rules of Civil Procedure provide, in pertinent part, that summary judgment

> shall be rendered forthwith if in the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(c). The Rules also allow that summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." *Id.* While "any doubt as to the existence of a genuine issue of fact is to be resolved against the moving party," *Wessinger* v. *Southern Ry. Co., Inc.*, 438 F. Supp. 1256, 1259 (D.S.C. 1977), the function of the Rule is not to preserve purely speculative issues of fact for trial. *Atlantic States Construction Co.* v. *Robert E. Lee & Co.*, 406 F.2d 827 (4th Cir. 1969). "The very

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[1] A factual dispute exists regarding whether COCC leased all of the Bluff Road site or only a portion thereof, as well as whether COCC was ever involved in hazardous waste disposal or storage activities.

mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see if there is a genuine need for trial." *Id.* at 829. Furthermore, summary judgment is not to be denied merely because the pleadings create the appearance of a dispute. *Watson* v. *Southern Ry. Co.*, 420 F. Supp. 483 (D.S.C. 1975), *aff'd*, 542 F.2d 1170 (4th Cir. 1976). Rather, "if in essence there is no real dispute as to the salient facts," the goal of the court is

> to smoke out if there is any case, i.e., any genuine issue as to any material fact, and, if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition.

Bland v. *Norfolk & Southern Ry. Co.*, 406 F.2d 863, 866 (4th Cir. 1969).

Reviewing the record in a light most favorable to the parties opposing the various motions, this court concludes that there are no material issues of fact in dispute other than the nature of COCC's business activities and the terms of its lease of the Bluff Road site. Thus, based on the undisputed facts, the court determines that the summary judgment motions of the defendants should be denied. The court further concludes that summary judgment should be granted in favor of the plaintiff against all defendants except COCC on the issue of those defendants' joint and several liability under CERCLA for costs incurred by the government in cleaning up the surface of the Bluff Road site.

THE UNDISPUTED FACTS

The undisputed facts established in the record can be summarized as follows. In 1972, Max G. Gergel, President of COCC, negotiated a verbal lease of at least a part of the Bluff Road site, a four acre piece of property located along Bluff Road near Columbia, South Carolina, on behalf of COCC with the property owners, Oscar Seidenberg ("Siedenberg") and Harvey Hutchinson ("Hutchinson"). COCC purportedly planned to use its leasehold for storage of raw chemicals and materials used in its manufacturing processes. COCC continued to lease at least a part of the property from the owners until 1978.

In late 1973 or early 1974, several individuals associated with COCC—James Q. A. McClure, Max Gergel, and Henry Tischler —began storing hazardous wastes, including hazardous substances, at the Bluff Road site as part of a waste brokering and recycling operation. In 1976, the three indiviudals incorporated South Carolina Recycling and Disposal Inc. ("SCRDI") and thereafter continued hazardous waste operations at the site under auspices of the corporation. SCRDI occupied part of the site from the years 1976 to 1978, and it assumed the verbal lease in 1978.

During the course of operations at the site by SCRDI and its predecessors, an environmental hazard of staggering proportions developed. Some 7,200 fifty-five gallon drums of hazardous substances, including materials which are toxic, carcinogenic, mutagenic, explosive, and highly flammable, accumulated at the site. The drugs were randomly and haphazardly stacked upon one another without regard to their source or the compatibility of the substances within. Many drums deteriorated to the point that their hazardous contents were leaking and oozing onto the ground and onto other drums. The exposure of these substances to the elements, as well as to other substances with which they comingled, caused a number of fires and explosions and generated noxious and toxic fumes.

Given the extremity of conditions at the site, the United States Environmental Protection Agency ("EPA") determined that the storage and disposal of hazardous substances there had resulted in releases and threatened releases of hazardous substances into the environment. EPA endeavored to remedy the hazardous conditions. An agreement was reached with twelve waste generators and one transporter associated with the site to perform 75% of the surface removal work at the site. The South Carolina Department of Health and Environmental Control ("DHEC") and several agencies of the federal government, also generators of some of the wastes at the Bluff Road site, have agreed as well to contribute funds to remedial activities at the site. Money from the Hazardous Substance Response Trust Fund established under CERLCA was used to finance the cleanup of the remaining 25% of the site's surface. Plaintiff seeks to recover costs associated with the second phase of the cleanup in this action.

The generator defendants—AquAir Corporation ("AquAir"), Allied Corporation ("Allied"), Monsanto Company ("Monsanto"), and EM Industries, Inc. ("EM")—are companies that arranged with SCRDI and its predecessors for treatment or disposal of hazardous substances. Drums belonging to each of these defendants were observed at the site during and before cleanup of the site. Moreover, hazardous substances of the same type found in each of these defendant's wastes were identified in samples taken at the site during cleanup operations.

DEFENDANT'S LIABILITY UNDER CERCLA §107

In Section 107(a)(1)-(4) of CERCLA, 42 U.S.C. § 9607(a)(1)-(4), Congress established a liability classification scheme which identifies four classes of defendants and describes the connection to a given waste site necessary for each to be held liable for response costs resulting from the release or threat of release of hazardous substances at the site. Once the requisite nexus is established, each class is strictly liable[2] *unless* they can prove that, under the defenses enumerated in CERCLA Section 107(b)(1)-(4), the release or threat of release of hazardous substances was caused solely by unrelated persons or events. Applying Section 107(a) to the undisputed facts, each defendant is clearly liable.

A. Liability of Generator Defendants

Section 107(a) of CERCLA provides in part that

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[2]The standard of liability provided for in Section 107 is undoubtedly strict liability. *See, e.g.*, United States v. Price, Civil Action No. 80-4104, 19 E.R.C. 1638, 1647 (D.N.J. July 28, 1983); City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135, 1148 (E.D. Pa. 1982); United States v. Royal N. Hardage, No. CIV 80-1031-W, Findings of Fact and Conclusions of Law (W.D. Okla. December 13, 1982), 13 ELR 20189. Apart from the express language of the provision, the definitional section of CERCLA, 42 U.S.C. §9601(32), makes it clear that the standard of liability that obtains under CERCLA is the same as the standard under Section 311 of the Clean Water Act, 33 U.S.C. §1321. That section clearly imposes strict liability. *See, e.g.*, United States v. Bear Marine Services, 509 F. Supp. 710 (E.D. La. 1980), *rem'd on other grounds*, 696 F.2d 1117 (5th Cir. 1983); United States v. Tex Tow, 589 F.2d 1310 (7th Cir. 1978).

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> . . .
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances . . . from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan . . . .

42 U.S.C. § 9607(a).

Stripping away the excess language of the statute, a generator may be held liable under Section 107(a)(3) of CERCLA if the government can prove that:

a. The generator's hazardous substances were, at some point in the past, shipped to a facility;

b. The generator's hazardous substances or hazardous substances *like* those of the generator were present at the site;

c. There was a release or threatened release of *a or any* hazardous substance at the site;

d. The release or threatened release causes the incurrence of response costs.

Under CERCLA's express terms, plaintiff need proving nothing more. *See United States* v. *Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983).

Generator defendants would nonetheless have this court require plaintiff to prove that hazardous substances traceable to each generator were released at the Bluff Road site or that

their specific substances were more than a *de minimus* factor in a release or threatened release. Significantly, similar "causation" arguments were recently expressly rejected by the Eastern District of Pennsylvania in *United States* v. *Wade*, *supra*, a case on all fours factually with this one.

In *Wade*, the court held that to require specific proof of causation would not only be at odds with the express language of the statute,[3] but also would effectively "eviscerate the statute" because of the technological infeasibility of "fingerprinting" a given generator's substances at a site. *Id.* at 1332. In support of its conclusion, the court noted that Congress considered and rejected language imposing liability on "any person who caused or contributed to the release"[4] in favor of CERCLA's present liability classification scheme, which clearly does not include comparable language. *Id.* at 1333. Concluding that Congress had not intended to saddle the government with an impossible causation burden, the court held that "[t]he only required nexus between the defendant and the site is that the defendant have dumped his waste there and that the hazardous substances found in the defendant's waste are also found at the site." *Id.* at 1333.

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[3]The generator defendants in *Wade*, like the generator defendants in this case, read CERCLA Section 107(a)(3) to require a showing that a generator's substances were shipped to a site and that there was a release or threatened release of *such* hazardous substances. The statute, however, requires only that there be a release or threatened release of *a* or *any* hazardous substance at the site.

[4]The Court was referring to H.R. 7020, 96th Cong., 2d Sess., §3071(a)(1), 126 Cong. Rec. at H9459 (daily ed. Sept. 23, 1980) and Senate Staff Working Paper #1 on S. 1480: Senate Comm. on Envir. and Pub. Works, 96th Cong., 2d Sess. §4(a) (February 1, 1980), reprinted in A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Senate Comm. on Envir. and Pub. Works, S. Doc. No. 97-14, 96th Cong., 2d Sess. (1983).

Notably, provisions of CERCLA's legislative history cited by generator defendants for the proposition that specific causation must be shown under Section 107(a)(3) relate either to the original causation language in H.R. 7020 or to a personal injury remedy that was also dropped from the Act. These provisions are, therefore, unpersuasive.

This court agrees with the conclusions reached in *Wade* and therefore rejects defendants' causation arguments. Plaintiff's burden of proof is defined by and limited to the express terms of the statute.[5] Applying those terms to the undisputed facts, it is clear that each of the generator defendants made arrangements with SCRDI or its predecessors for disposal or treatment of wastes containing hazardous substances and that, as evidenced by the identification of each generator's drums at the Bluff Road site, such wastes were shipped to the site. It is further undisputed that hazardous substances like those of each of the generator defendants were present at the site at the time of cleanup, as shown by samples taken at the site;[6] that there were releases and threatened releases of hazardous substances at the site; and that the government incurred costs in responding to those releases and threatened

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[5]The statute takes into account the synergistic potential of improperly managed hazardous substances and essentially presumes a contributory "causal" relationship between each of the hazardous substances disposed of at a site and the hazardous conditions existing at the site. This presumption may be rebutted under Section 107(b) of CERCLA if a defendant can show that the conditions at the site were caused solely by a person unrelated contractually to that defendant. While some of the defendants stated Section 107(b) defenses in their answers, none of them have supported that defense by way of affidavits or otherwise. Under summary judgment procedure, a party "may not rest upon the mere allegations or denials of his pleading but . . . , by affidavits or otherwise provided in this rule, must set forth specific facts showing that is a genuine issue for trial." Fed. R. Civ. P. 56(e).

[6]This court does not mean to suggest that because the government was able to show by way of chemical analysis in this case that each generator's substances or substances like those of each generator were at the site, it must undertake extensive sampling and analysis in performing cleanups. As the government pointed out in its affidavits, it would have cost in the range of $2.5 million to attempt through analytical means to identify all waste types in the conglomerate of materials stored at the Bluff Road site, approximately five times the cost of surface removal itself. Less resource exhaustive means of showing that a generator's waste or similar wastes are at a site, such as by identification of a generator's drum at the site during cleanup or by way of documentary or circumstantial proof that the wastes were hauled to the site absent proof that they were subsequently taken away, should also be sufficient to satisfy this element of proof.

releases. Thus, based on the undisputed facts, each of these generator defendants is subject to liability under Section 107 of CERCLA.

B. Liability of the Landowners

Under Section 107(a)(2) of CERCLA, "any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of" and at which there has been a release or threatened release of hazardous substances, is liable for response costs incurred at the site. 42 U.S.C. §9607(a)(2). The landowners Hutchinson and Seidenberg do not dispute their ownership of the Bluff Road property or that hazardous substances were disposed on the property during their period of ownership. They also have not disputed that there were releases and threatened releases of hazardous substances at the site which caused the incurrence of response costs. Consequently, there are no material issues with respect to these defendants' liability.

In this connection, the court notes that after the summary judgment hearing, the landowners sought to amend their Answer, which the court permitted with plaintiff's consent. The landowners urge that their Answer, as amended, raises disputed issues of fact concerning the affirmative defense to liability provided by 42 U.S.C. §9607(b)(3). The court does not agree that the amended Answer and the landowners' affidavits raise such genuine issues of fact. The §9607(b)(3) defense would require the landowners to prove *inter alia* that "the release or threat of release of a hazardous substance and the damages resulting thereform were caused *solely* by . . . (3) an act or omission of a third party other than . . . one whose act or omission occurs in connection with the contractual relationship, existing directly or indirectly with the defendant. . . ." (emphasis added). Because there is no question of the contractual link between the landowners and SCRDI, whose liability is admitted, the landowners cannot under any circumstances prove that the release was caused "solely" by a third party which did not share a contractual relationship with them. Thus, because the §9607(b)(3) defense is unavailable to them from the outset, the landowners cannot rely on disputed factual issues concerning its other requirements to bar the summary judgment against them.

C. Liability of SCRDI

SCRDI has not contested any facts material to its liability as operator of the Bluff Road site. Furthermore, SCRDI's counsel consented to the entry of summary judgment against SCRDI at oral argument on this matter.

D. Liability of COCC

COCC has attempted to show a factual dispute with respect to its responsibility for the Bluff Road site by way of affidavits written in July of 1980 by its President, Steven Reichlyn and its former President, Max Gergel. Portions of both affidavits state that COCC was never involved in hazardous waste disposal or storage activities. The Reichlyn affidavit further suggests that COCC leases only a fraction of the Bluff Road site from the landowners.

Plaintiff has moved to strike these assertions in the affidavits, arguing that they fail to raise a genuine issue of fact because they are grossly inconsistent with the rest of the record in the case. Plaintiff further contends that the statements in the Reichlyn affidavit are not based on personal knowledge.

While the court recognizes that other aspects of the record sharply conflict with the affidavits offered by COCC, it concludes that such credibility determinations should be made at trial, and not on a motion for summary judgment.

JOINT AND SEVERAL LIABILITY OF DEFENDANTS

Having determined that each of the defendants except, at this point, COCC, are liable for response costs under Section 107(a) of CERCLA, the extent of their liability must now be determined. Several courts have recently addressed this issue and have reached the conclusion that joint and several liability is appropriate under CERCLA in circumstances of indivisible injury. *See, e.g., United States* v. *Wade, supra,* at 1337-1338; *United States* v. *Chem-Dyne,* 572 F. Supp. 802 (S.D. Ohio 1983). This court finds particularly persuasive the conclusion reached in the *Chem-Dyne* decision and adopts the analysis

and standard employed by the court in that case.[7] In *Chem-Dyne*, the court made the following conclusions:

> This case, as do most pollution cases, turns on the issue of whether the harm . . . is "divisible" or "indivisible." If the harm is divisible *and* there is a reasonable basis for apportionment of damages, each defendant is liable only for the portion of the harm he himself caused . . . . In this situation, the burden of proof as to apportionment is upon each defendant . . . . On the other hand, if the defendants caused an entire indivisible harm, each is subject to liability for the entire harm.

Id. at 811 (citations omitted and emphasis added). Under the *Chem-Dyne* standard, this court's initial focus should be on whether the harm at the Bluff Road site was divisible, an issue upon which defendants bear the burden of proof. If the harm was indivisible, the court's inquiry is complete for purposes of this action.

This court concludes that, based on undisputed facts, the harm at the Bluff Road site was indivisible. Because of the deleterious condition of the site at the time of cleanup, it is impossible to divide the harm in any meaningful way. There were thousands of corroded, leaking drums at the site not segregated by source or waste type. Unknown, incompatible materials comingled to cause fires, fumes, and explosions. Because of the constant threat of further fires, explosions, and other reactions, all of the materials at the site were, if not actually oozing out, in danger of being released. Thus, while

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[7]After this court's bench ruling on the issue of each defendants' joint and several liablity under CERCLA §107, an opinion was rendered by the Southern District of Illinois, in United States v. A & F Materials Company, Inc., 578 F. Supp. 1249 (1984), on the same issue. The *A & F* decision could be considered at odds in some respects with the *Chem-Dyne* decision. This court finds the *Chem-Dyne* decision more in keeping with Congress' intention that evolving and traditional principles of common law and prior statutory law govern the courts' imposition of joint and several liability under CERCLA and, accordingly, follows the analysis employed in that case. I reject the analysis of *A & F* to the extent that it is inconsistent with Chief Judge Rubin's opinion in *Chem-Dyne*.

all of the substances at the site contributed synergistically to the threatening condition at the site, it is impossible to ascertain the degree of relative contribution of each substance. Clearly, the harm was indivisible, and defendants have failed to meet their burden of proving otherwise.

Generator defendants have argued that there may be a means of roughly apportioning the costs of cleanup among responsible parties by calculating their relative volumetric contributions from shipping documents, and that, therefore, the harm is divisible. But, as noted by the court in *Chem-Dyne*, "the volume of waste of a particular generator is not an accurate predictor of the risk associated with the waste because the toxicity or migratory potential of a particular hazardous substance generally varies independently of the volume." *Chem-Dyne, supra*, at 18. Such arbitrary or theoretical means of *cost* apportionment do not diminish the indivisibility of the underlying harm, and are matters more appropriately considered in an action for contribution between responsible parties after plaintiff has been made whole.[8]

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[8]For some recent applications of this principle, see *In the Matter of the Complaint of Berkeley Curtis Bay Co.*, 557 F. Supp. 335 (S.D.N.Y. 1983) (although it was theoretically possible to apportion responsibility for an oil spill between two defendants 65%-35%, joint and several liability was nonetheless imposed); *City of Perth Amboy* v. *Madison Industries, Inc.*, Sup. Ct. cf. N.J. Appellate Div., A-1127-81T3 and A1276-81T3 (Consolidated) (April 21, 1983) (two waste generators held jointly and severally liable for contaminating a pond even though one of the generator's substances contaminated only the pond water and the other generator's substances contaminated only the pond sediments); *State of New York* v. *Schenectady Chemicals, Inc., Reuselaer Co.* Index No. 144654 (N.Y. Sup. Ct. Feb. 18, 1983) (joint and several liability could be imposed even though volumetric contributions of defendants were known).

As noted in the Restatement (Second) of Torts, "[i]n recent years the trend, both of legislation and of decisions in absence of it, has been toward recognition of the right of contribution; and a substantial majority of states now grant contribution." §886A, Comment (a). See, *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 260 n.8 (1979) (citing §886A of the Restatement). Such evolving principles of common law were intended by Congress to guide the courts in fleshing out CERCLA's liability provisons. *Chem-Dyne, supra*, at 808. Under the Restatement, questions of

Because the harm at the Bluff Road site is indivisible, each defendant against whom summary judgment is granted is jointly and severally liable for costs incurred at the site.

CONSTITUTIONAL ISSUES

Environmental statutes like CERCLA which regulate and adjust the benefits and burdens of economic life come before the Court with a strong presumption of constitutionality. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83-84 (1978). The generator defendants in this case nevertheless urge this court to find that liability under CERCLA is unconstitutionally retroactive and, further, that CERCLA violates the Contract Clause of the United States Constitution. These arguments are without force.

Defendants' Contract Clause argument is particularly transparent. Article I, §10 of the Constitution provides that "[n]o *State* shall . . . pass any . . . law impairing the obligation of contracts." (Emphasis added). Thus, by its express terms, the Contract Clause applies only to State legislation, not federal laws like CERCLA. *See Allied Structural Steel Company* v. *Spannaus*, 438 U.S. 234, 257 (1978), *reh. den.* 439 U.S. 886; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 589 (1935), *reh. den.*, 296 U.S. 661; *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 188 (1902). Moreover, even if the Contract Clause were construed to apply to CERCLA, the Act has not operated substantially to impair these defendants' waste disposal contracts with SCRDI. To the contrary, the contracts remain valid and enforceable between the parties. There is nothing to prevent a generator defendant held liable here from seeking indemnity from SCRDI under their contract.

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determining "equitable shares of the liability" with respect to an indivisible injury are appropriately resolved in an action for contribution after plaintiff has been made whole. See Restatement §886A (1) and (2). Notably, Section 107(e)(2) of CERCLA permits actions in contribution among parties held jointly and severally liable. *Chem-Dyne, supra*, at 807 n.3; 126 Cong. Rec. H. 11,788 (daily ed. Dec. 3, 1980) (opinion of Assistant Attorney General read into record by Rep. Florio). Making plaintiff, the Fund, whole in the first instance allows costs expended at the Bluff Road site to be recouped quickly and applied to other hazardous waste problems.

While somewhat more substantial, defendants' argument that CERCLA is so impermissibly retroactive that it violates due process also fails. Although liability under CERCLA is premised in part upon conduct which occurred prior to CERCLA's enactment in 1980, this court does not consider CERCLA "retroactive" in the constitutional sense as applied to the facts of this case. The plain language of Section 107 of CERCLA makes it quite clear that CERCLA is a broad remedial statute premised upon *present and future effects* of defendants' past actions—a "release" or a "threatened release" of a hazardous substance must occur before any liability attaches. A statute that attaches liability to present conditions stemming from past acts does not necessarily have retroactive effects that are subject to due process limitations.[9] As noted by the Supreme Court in *Reynolds* v. *United States*, 292 U.S. 443 (1934), "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Id.* at 449.

Recent decisions under Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, a statutory provision analogous to Section 107 of CERCLA, are persuasive on this point. Section 7003 authorizes the United States to bring suit to secure such relief as is necessary to abate an imminent and substantial endangerment to health or the environment caused by hazardous wastes. Courts interpreting Section 7003 have held that it is not "retroactive" in nature because its objective is to obtain relief

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[9]*See Chicago & Alton Railroad Company* v. *Tranbarger*, 238 U.S. 67 at 73, 76 (1915) (statute requiring bridge culvert does not apply retroactively to railroad which built bridge without culvert three months before statute enacted; railroad subject to liability because "after that time [enactment of the statute] it maintained the enbankment in a manner prohibited"); *City of Bakersfield* v. *Miller*, 64 Cal.2d 93, 48 Cal. Rptr. 889, 410 P.2d 393, 399, *cert. denied*, 384 U.S. 988 (1966) (building constructed in accordance with existing building codes ordered modified pursuant to revised code which was enacted "to eliminate presently existing public danger"); *Reynolds* v. *United States*, 292 U.S. 443, 449 (1934); *United States* v. *Jacobs*, 306 U.S. 363, 367 (1939); *Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U.S. 559, 571 (1934); *Cox* v. *Hart*, 260 U.S. 427, 435 (1922).

to abate current and future hazardous conditions, notwithstanding the fact that the conditions might be attributable to past acts. See *United States* v. *Price*, 523 F. Supp. 1055, 1071-1072 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3rd Cir. 1982); *United States* v. *Diamond Shamrock Corporation*, C.A. No. 80-1857, 17 E.R.C. 1329 (N.D. Ohio, May 29, 1981). As stated in *United States* v. *Price*,

> Defendants . . . observe that Section 7003 was not adopted and did not become effective until 1976, and they argue that the statute was not meant to apply retroactively to acts that preceded that date. Hence, because the dumping of toxic wastes at Price's Landfill ceased in 1972, defendants argue that the statute cannot be used to impose liability on them.
>
> We find this argument unpersuasive. . . . The gravamen of a Section 7003 action, as we have construed it, is not defendants' dumping practices, which admittedly ceased with respect to toxic wastes in 1972, but *the present imminent hazard* posed by the continuing disposal (*i.e.*, leaking) *of contaminants into the groundwater*. Thus, the statute neither punishes past wrongdoing nor imposes liability for past acts. Rather, as defendants themselves argue, its orientation is essentially prospective. When construed in this matter, *the statute simply is not retroactive. It merely relates to current and future conditions*.

Id. (Emphasis added.) See also *Commonwealth* v. *Barnes & Tucker Co.*, 23 Pa. Cmwlth. 496, 319 A.2d 871, 884 (Pa. Sup. Ct. 1974), 371 A.2d 461 (holding that a law requiring the abatement of present conditions constituting a public nuisance stemming from past acts is not a "retroactive" law), *appeal dismissed sub nom., Barnes & Tucker Co.* v. *Pennsylvania*, 434 U.S. 807 (1977).

Thus, it is this Court's view that CERCLA is not retroactive as applied in this case. Such a construction avoids a constitutional question and is therefore preferred. *Lorrilland* v. *Pons*, 434 U.S. 575, 577 (1978); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). It should be noted, however, that even if CERCLA were considered retroactive it would clearly satisfy the requirements of due process.

The fact that a statute has retroactive application that may upset settled expectations does not necessarily make it unconstitutional. *Usery* v. *Turner Elkhorn*, 428 U.S. 1, 16 (1976); *Fleming* v. *Rhodes*, 331 U.S. 100 (1947). "This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Turner Elkhorn*, 428 U.S. at 16; *Lichter* v. *United States*, 334 U.S. 742 (1948); *Welch* v. *Henry*, 305 U.S. 134 (1938); *Funkhouser* v. *Preston Co.*, 290 U.S. 163 (1933). In *Turner Elkhorn*, the leading case on the constitutionality of retroactive statutes, the Supreme Court made clear the standard to be employed in the instant case: in the area of economic regulation, legislation that operates retroactively does not violate due process if it is rationally related to a valid Congressional purpose. 428 U.S. at 15-16.

In *Turner Elkhorn*, the Supreme Court upheld the Black Lung Act of 1972, 30 U.S.C. § 901, against a challenge that it violated due process because it applied retroactively. The Act required coal mine operators to compensate past and present miners, as well as minors' survivors, for total disability or death due to black lung disease. Notably, minors who left employment before the effective date of the Act were eligible for benefits. The mine operators argued that "to impose liability upon them for former employees' disabilities is impermissibly to charge them with an unexpected liability for past, completed acts that were legally proper and, at least, in part, unknown to be dangerous at the time." 428 U.S. at 15. Rejecting the operators' challenge to the statute, the Court noted that

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Id. These principles, the Court elaborated, apply to retrospective, as well as prospective, legislation:

> [O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability on past acts.

Id. at 16 (citations omitted). The Court concluded that Congress had acted rationally in enacting the Black Lung Act:

> [T]he imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers.

Id. at 18.

To the extent that CERCLA is considered retroactive, it clearly satisfies the *Turner Elkhorn* standard. Like the statute at issue in *Turner Elkhorn*, CERCLA was enacted in response to the threat perceived by Congress to be caused by inactive and abandoned hazardous waste sites, a problem described as the most serious health and environmental problem of the decade. *See* S. Rep. No. 96-848, 96th Cong., 2d Sess. 2 (1980). As with the Black Lung Act, Congress intended through CERCLA to create a broad remedial statute which allocates to those persons responsible for creating dangerous conditions, and who profited from such activities, the true costs of their enterprise. An overriding objective in enacting CERCLA to spread the economic costs of cleanup operations among "those responsible for any damage, environmental harm, or injury [resulting from] chemical poisons. . . ." S. Rep. No. 96-848, 96th Cong., 2d Sess. 12 (1980).[10]

The liability scheme established under CERCLA is clearly a rational means of achieving this objective. Whether some other approach to spread these costs would have been

---

[10]Similarly, as the Seventh Circuit noted in commenting on cost allocation under Section 311 of the Clean Water Act:

> [T]he party engaged in the potentially polluting enterprise is in the best position to estimate the risk of accidental pollution and plan accordingly as by raising its prices or purchasing insurance. Economically, it makes sense to place the cost of pollution on the enterprise (here water transport of gasoline) which statistically will cause pollution and in fact does cause pollution.

United States v. *Tex-Tow, Inc.*, 589 F.2d 1310, 1314-15 (7th Cir. 1978).

wiser or more practical is not a question of constitutional dimensions but is rather a policy question which must be left to the Congress and not to the courts. *Turner Elkhorn*, 428 U.S. at 19. Having recognized a rational relationship between Congress' goals and the means chosen to implement them, this court concludes that, if considered retroactive, CERCLA is not unconstitutionally retroactive.[11]

TIMELINESS OF ACTION

As a final matter, several of the defendants have urged that because the government had not yet incurred all response costs associated with surface removal activities at the Bluff Road site at the time its amended complaint was filed, and Section 107(a) of CERCLA limits the government's recovery to costs "incurred," plaintiff's action was prematurely instituted. As a practical matter, this issue is now moot, since surface removal activities at the site were completed in July of 1983. In any event, the government need not have incurred all

---

[11]The fact that some of the defendants held liable here have also contributed to the Hazardous Substance Response Trust Fund does not diminish CERCLA's rationality. To require the industry generically responsible for hazardous waste problems to contribute to a fund which bears the costs of cleaning up sites where viable responsible parties cannot be found, while at the same time holding individual companies liable for costs associated with specific sites to which they have contributed wastes, appears imminently rational.

This court also finds unpersuasive generator defendants' argument that the "irrebuttable causal presumption" embodied in Section 107(a) is unconstitutionally rigorous under the analysis employed by the Supreme Court in *Turner Elkhorn*. First, the presumption of contributary causation in Section 107(a) is not irrebuttable because a defendant may prove under Section 107(b) that the harm at a site was caused solely by persons or events unrelated to itself. Moreover, the presumption embodied in Section 107 appears to be far less tenuous than the causal presumptions upheld by the Supreme Court in *Turner Elkhorn*. To be constitutional, "it is only essential that there be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be unreasonable as to be a purely arbitrary mandate." *Turner Elkhorn*, 428 U.S. at 28. The rebuttable presumption that hazardous substances present at poorly managed hazardous waste sites contribute causally to the overall hazardous and threatening conditions at such sites is neither arbitrary nor irrational, and, therefore, satisfies due process.

costs related to a site before initiating a cost recovery action under Section 107(a) of CERCLA. See *United States* v. *Wade*, *supra*, at 1334-1335; *United States* v. *A & F Materials*, *supra*, at 1258-1259.

CONCLUSION

In summary, each of the defendants falls within one of the classes of persons identified in Section 107(a) of CERCLA as liable for response costs associated with the Bluff Road site. Because the harm at the site was indivisible, their liability is joint and several. Therefore, this court, finding no constitutional impediments to its conclusions, denies defendants' motions and grants summary judgment in favor of plaintiff on the issue of the joint and several liability of each defendant except COCC for surface removal costs incurred by plaintiff at the Bluff Road site. Summary judgment against COCC is denied. The liability of COCC and the amount of recovery to which plaintiff is entitled will be resolved in subsequent proceedings.

AND IT IS SO ORDERED.

/s/ CHARLES E. SIMONS, JR.
UNITED STATES DISTRICT JUDGE

Columbia, S.C.
February 21, 1984.

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ENTERED
12–20-85
FILED
DEC 19 1985
John W. Williams, Clerk
U.S. District Court

Civil Action No. 80-1274-6

United States of America, *Plaintiff,*

and

South Carolina Department of Health and Environmental Control,

vs.

South Carolina Recycling and Disposal, Inc.; Columbia Organic Chemical Company; Oscar Seidenberg; Harvey Hutchinson; Monsanto Company; Allied Corporation; AquAir Corporation; and EM Industries Inc., *Defendants,*

vs.

G. D. Searle & Co., and Will Ross, Inc., *Third-Party Defendants.*

Order of Dismissal of
Defendant Columbia
Organic Chemistry Company

Upon consideration by this Court of the Joint Motion of Plaintiff, the United States of America, Plaintiff-Intervenor, the State of South Carolina, and Defendant, Columbia Organic Chemical Company ("COCC"), to dismiss COCC from the lawsuit in settlement of claims for the amount of $15,000 it is hereby

ORDERED that the claims as to surface cleanup response costs at the Bluff Road site against COCC are hereby dismissed with prejudice. It is further

ORDERED that the dismissal of COCC shall not affect any other liability or affect the dismissal of any other defendant or other persons in this matter. It is further

ORDERED that Plaintiffs' rights and claims in this matter, as these relate to any other party to the lawsuit, are not affected other than to reduce the total sums due to Plaintiff by the amount of $15,000 as stipulated herein.

/s/ CHARLES E. SIMONS, JR.
CHARLES E. SIMONS, JR.
United States District Judge

Columbia, South Carolina
December 19 1985

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FILED
AUG 15 1986
John W. Williams, Clerk
Columbia, S.C.

Civil Action No. 80-1274-6

United States of America, *Plaintiff,*

and

South Carolina Department of Health and Environmental Control, *Plaintiff-Intervenor*

v.

South Carolina Recycling and Disposal, Inc.; Oscar Seidenberg; Harvey Hutchinson; Monsanto Company; Allied Corporation; AquAir Corporation; and EM Industries, Inc., *Defendants.*

Final Order
Entered
8-18-86

This action was brought by plaintiff United States of America pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, to recover costs of removing hazardous substances from the surface of the Bluff Road site, a hazardous waste site located near Columbia, South Carolina. The State of South Carolina entered the action as plaintiff-intervenor and also seeks to recover costs associated with the surface removal action at the Bluff Road site.

On November 22, 1985, this Court entered an order adjudging defentants jointly and severally liable to the United States in the amount of $1,065,910.92 and to the State in the amount of $93,000. The Court further granted the plaintiffs sixty (60) days to file and serve affidavits supplementing the amounts stated in the order. This time was extended to March 10, 1986 by orders dated January 23, 1986 and January 29, 1986.

Plaintiff United States has filed with the Court and served on defendants affidavits and an accounting of the federal government's supplemental costs, amounting to $495,223.63. The final cost figure submitted by the United States is thus $1,561,134.55. The State filed with the Court and served on defendants an affidavit supplementing the State's costs by $159,489.46, which totals a final figure of $252,489.46.

By the Court's order of November 22, 1985, defendants were granted thirty (30) days after the governments' submissions of the supplemental costs in which defendants could conduct discovery relating to such costs and file opposing affidavits. That time has expired and defendants have not filed any challenge to the supplemented costs. Therefore, these supplemental costs associated with the removal action to clean up the surface of the Bluff Road site, being uncontested, are hereby accepted by the court as correct, appropriate, and recoverable. Accordingly, defendants, having heretofore been adjudged liable, jointly and severally, for the costs of the removal actions at the Bluff Road site, must pay to plaintiff and plaintiff-intervenor the amounts of $1,561,134.55 and $252,489.46 respectively.

The award of costs resolves plaintiffs' claims under Section 107 of CERCLA for removal costs associated with the surface cleanup of the Bluff Road site. There remain before the Court claims for injunctive relief relating to the surface of the site under Section 106 of CERCLA, 42 U.S.C. § 9606, and Section 7003 of the Resource Conservation and Recovery Act of 1976 (''RCRA''), 42 U.S.C. § 6973. These claims are now moot because the removal actions at the surface have been completed. The Court notes that the original complaint included claims which encompassed potential remedial actions at the site, including action associated with sub-surface and groundwater contamination. Because studies were needed to

determine the need for remedial action at and around the site, plaintiff and plaintiff-intervenor moved the Court in 1982 to limit the instant claims to costs incurred as a result of removal actions addressing the site's surface, reserving their rights to make further amendments, such as expanding their claims to address site remedial action. This Court sanctioned that approach by entering an order dated August 4, 1982 granting plaintiff's unopposed motion to file the Second Amended and Supplemental Complaint and expressly reserved the plaintiff's and plaintiff-intervenor's rights to make further amendments. Now that litigation of the claims relating to the surface removal actions at the site has concluded, this Court determines that it is appropriate for the plaintiff and plaintiff-intervenor to bring any claims relating to remedial actions in a subsequent civil action. This approach will allow the Court to remove this case from the docket in the interest of judicial economy. Defendants will not be prejudiced if claims for remedial action are litigated in a separate action rather than by way of an amendment to the complaint in the instant case. Furthermore, allowing separate litigation of these claims is consistent with CERCLA's objective of assuring prompt replenishment of the Fund established by CERCLA for use at other hazardous waste sites.

Therefore, this Order is final only with respect to claims for the costs of surface removal actions at the Bluff Road site, and shall be without prejudice to any claims associated with or related to remedial actions at the site.

IT IS SO ORDERED

/s/ CHARLES E. SIMONS, JR.
CHARLES E. SIMONS, JR.
United States District Judge

Aiken, South Carolina
August 14, 1986

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APPENDIX H

ENTERED
May 6, 1986
Clerk, U.S. District Court
Central Distict of California
By Deputy

FILED
May 5, 1986
Clerk, U.S. District Court
Central District of California
By

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MOLA DEVELOPMENT CORPORATION, *Plaintiff,*	NO. CV 82-0819-RMT(JRx)
vs.	ORDER DISMISSING COUNTERCLAIMS FOR INDEMNITY
UNITED STATES OF AMERICA, et al., *Defendants.*	
AND RELATED CLAIMS.	

This matter has come before the court on its own motion on the issue of whether counterclaims filed herein for indemnity or contribution state a claim. The counterclaims in issue are the following:

(1) Counterclaim by the U.S. against Mola, filed May 24, 1985;

(2) Counterclaim by Steverson against Mola, filed August 13, 1985;

(3) Counterclaim by Tobin against Mola, filed October 15, 1985;

(4) Counterclaim by Steverson against the U.S., filed July 26, 1985;

(5) Counterclaim by Tobin against Steverson, filed September 4, 1985;

(6) Counterclaim by Tobin against the Oil Companies, filed September 4, 1985; and

(7) Indemnity claim contained in the counterclaim by Richey against the U.S., filed June 28, 1985.

Given the nature of this action, the outcome might be joint and several liability; an apportionment among all parties legally responsible, including plaintiff; or a holding that plaintiff is solely responsible. Given the number of parties involved, it is understandable that all parties sued will seek to shift or share any loss it might incur. However, a counterclaim for indemnity or contribution is illogical. For example, if A sues B, A has the burden of proving B's liability and the amount thereof in A's case in chief. B, in its defense, might show limitations on its liability or amount thereof. As a result, in the trial on A's complaint against B, the relative responsibilty for A's loss will be litigated. If B counterclaimed against A for indemnity or contribution, B would be making a claim against A to shift to or share with A any loss B incurs as a result of A's suit against B. However, any basis that could exist for B's counterclaim must be litigated on A's complaint and B's defenses thereto. As a result, any shifting or sharing of the loss is litigated on A's complaint and no basis exists for B's counterclaim. Accordingly, a counterclaim for indemnity or contribution fails to state a claim.

In the briefs filed herein, the government seeks a ruling that liability will not be joint and several. However, such a ruling depends on facts that are still in issue.

Accordingly,

IT IS ORDERED that the following counterclaims are dismissed:

(1) Counterclaim by the U.S. against Mola, filed May 24, 1985;

(2) Counterclaim by Steverson against Mola, filed August 13, 1985;

(3) Counterclaim by Tobin against Mola, filed October 15, 1985;

(4) Counterclaim by Steverson against the U.S., filed July 26, 1985;

(5) Counterclaim by Tobin against Steverson, filed September 4, 1985;

(6) Counterclaim by Tobin against the Oil Companies, filed September 4, 1985; and

(7) Indemnity claim contained in the counterclaim by Richey against the U.S., filed June 28, 1985.

Having dismissed the above-mentioned counterclaims,

IT IS ORDERED that the following pleadings filed in response to the dismissed counterclaims are hereby stricken:

(1) Mola's answer and cross-claim, filed June 21, 1985;

(2) Richey's answer and cross-claim, filed July 19, 1985;

(3) Mola's answer and cross-claim, filed August 26, 1985; and

(4) Tobin's answer and third party cross-claim filed October 15, 1985.

Dated: May 5, 1986.

/s/ ROBERT M. TAKASUGI

ROBERT M. TAKASUGI
United States District Judge

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1404

IN THE

Supreme Court Of The United States

October Term, 1988

MONSANTO COMPANY, ALLIED-SIGNAL, INC. AND EM INDUSTRIES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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April 28, 1989

QUESTIONS PRESENTED

1. May Petitioners raise an asserted failure of the district court to comply with Federal Rule of Civil Procedure 54(b) when the issue was not preserved in the courts below?
2. Was the district court's deferral of the cost apportionment to a possible contribution action error when the undisputed facts in the cost recovery action established joint and several liability and there has been no showing of prejudice?
3. Was the district court's finding of joint and several liability error when the undisputed facts established that the harm at the site was indivisible and that it was impossible to ascertain the degree of relative contribution of each cause to the harm?

LIST OF PARTIES

The parties to the proceeding below were the United States of America, the South Carolina Department of Health and Environmental Control, Oscar Seidenberg, Harvey Hutchinson, Monsanto Company, Allied-Signal, Inc. (formerly Allied Corporation), and EM Industries, Inc.

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No. 88-1404

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MONSANTO COMPANY, ALLIED-SIGNAL, INC.
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v.

UNITED STATES OF AMERICA,
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

The South Carolina Department of Health and Environmental Control (DHEC) respectfully urges the Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), and can be located in petitioner's petition, Appendix B, pages B-1 through B-30. The order of the Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing

en banc can be located in petitioner's petition, Appendix A, pages A-1 and A-2.

The opinion and various orders of the district court are reported in *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984).

The district court's order of partial summary judgment (as to liability), filed February 23, 1984, can be located in petitioner's petition, Appendix E, pages E-1 through E-19.

The district court's order of summary judgment (as to cost recovery under CERCLA), dated November 22, 1985, is not included as an appendix in petitioner's petition, but can be located in Respondent DHEC's brief, Appendix, pages A-1 through A-8. The district court's final order, entered August 18, 1986, can be located in petitioner's petition, Appendix G, pages G-i through G-3.

The district court's judgment, entered and filed on September 23, 1986, can be located in petitioner's petition, Appendix D, pages D-1 and D-2.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 7, 1988. A timely petition for rehearing and suggestion for rehearing in banc was denied on December 2, 1988. This denial can be located in petitioner's petition as Appendix A at pages A-1 and A-2.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1). Respondent South Carolina Department of Health and Environmental Control does not contest the Court's jurisdiction in this proceeding.

STATUTORY PROVISIONS INVOLVED

CERCLA Section 107(a)

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section . . .

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of haz-

ardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . .

. . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

CERCLA Section 113(f)(1), (2)
as amended by SARA

(1) CONTRIBUTION.—Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

(2) SETTLEMENT.—A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters

addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

STATEMENT OF THE CASE

I. THE LEGAL QUESTIONS PRESENTED.

This is an appeal from a judgment holding Monsanto Company, Allied-Signal, Inc. and EM Industries, Inc. (the "defendants," "generator defendants" or "petitioners") jointly and severally liable to the United States and South Carolina (collectively called the "plaintiffs" or "governments") under Section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA", 42 U.S.C. §9607(a)(3)(1982 and Supp. IV 1986), for response costs arising from the release or threat of release of hazardous substances at the Bluff Road hazardous waste site located near Columbia, South Carolina. Petitioners seek this Court's review of two procedural issues.

The first procedural issue raised in the petition relates to compliance with Rule 54(b), Federal Rules of Civil Procedure. Petitioners' first question states the issue as being whether a trial court can mandate deferral of liability and allocation issues in a cost recovery action under CERCLA without complying with Rule 54(b). In the context of this appeal, allocation should be understood as a reference to *cost* apportionment, an issue of contribution, as opposed to apportionment of the underlying liability.

The procedure followed by the trial court in this case was deferral of the contribution action from the underlying cost recovery action.

The trial court dealt squarely with the question of apportionment of the underlying liability as part of the case-in-chief. The court found the underlying harm to be indivisible and not reasonably capable of apportionment. Thus the trial court held the generator defendants to be jointly and severally liable for cleanup costs. In so finding the trial court noted that *cost* apportionment could be properly dealt with in a later action for contribution. Petition, E-12.

Petitioners now assert that the trial court's deferral of the contribution action is not in compliance with Rule 54(b). However, the question of compliance of Rule 54(b) was never presented to the trial court. Moreover, no reference to Rule 54(b) is found in the petitioners' primary brief in the Fourth Circuit. Petitioners did not complain of the deferral or Rule 54(b) at all until the issue was raised in the petitioners' joint reply brief and answering brief and motion for rehearing before the Fourth Circuit.

The second procedural issue raised by petitioners revolves around the burden of proof for apportionment of liability among the generator defendants. The petitioners argue that under the *Restatement (Second) of Torts*, the burden of apportionment should have been on the plaintiffs in the trial court. Petitioners contend that the courts below erred in placing the burden of proof of apportionment on the generator defendants. However, petitioners ignore the lower court's finding that it was proved by "undisputed facts" that the harm involved was "indivisible" and that on the facts of the case it was "impossible to ascertain the degree of relative contribution of each substance" at the site. Petition, E-11 and E-12. It was on the basis of the *facts* of the case, *established* by plaintiffs, that the district court held defendants jointly and severally liable. The Fourth Circuit agreed with the lower court's finding of joint and several liability.

Section 433A(2) of the *Restatement* provides that damages for harm are *not* to be apportioned among defendants where there is no reasonable basis for determining the contribution of each cause to a single harm. The "undisputed facts" of this case as submitted to the district court established that the harm was indivisible and not capable of apportionment. Petition, E-11 and E-12. The trial court committed no error in finding that defendant-generators had failed to controvert plaintiffs' evidence.

Petitioners also raise a separation of powers questions which the Fourth Circuit refused to consider because it had not been raised before the district court. Petition, B-23, n.30. The Fourth Circuit found no circumstances warranting de novo review of the separation of powers issue.

II. FACTUAL AND PROCEDURAL CONTEXT.

This case arises out of the cleanup of the Bluff Road site, a waste facility, located near Columbia, South Carolina. The Bluff Road site was operated between 1972 and 1980. The petitioners and other generators of hazardous waste contracted with the operators for disposal of hazardous wastes which were sent to the site. Included among those sending wastes to the site were the United States government and South Carolina Department of Health and Environmental Control. During the course of operations, an environmental hazard of staggering proportions developed.

The Federal Government initially filed suit on July 7, 1980, against the site operators and landowner for cleanup, seeking abatement of releases from the site under Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6973 (1982 & Supp. IV 1986). South Carolina intervened as a plaintiff on June 6, 1981. In the course of discovery, the United States identified a number of hazardous waste generators whose wastes were disposed of at Bluff Road. These companies, including the generator defendants here, were notified that they were potentially liable for cleanup of the site. An agreement was reached with twelve generators and one transporter of waste to perform 75% of the surface cleanup at the site. A partial consent decree enforcing the 75% cleanup was entered by the district court on March 23, 1982. Joint Appendix, 105. The private cleanup operation was completed on October 1, 1982.

A second amended and supplemental complaint was filed on August 4, 1982. Joint Appendix, 122. It added, among others, the non-settling, generator defendants. It also added claims under CERCLA Section 106 (injunctive relief) and Sections 104 and 107 (cost recovery). South Carolina completed the remaining 25% of the surface cleanup using federal money from the Hazardous Substances Response Trust Fund established by Section 221 of CERCLA, 42 U.S.C. §9631, as well as State money from the South Carolina Hazardous Waste Contingency Fund, S.C. Code Ann. §44-56-160 (1985), plus in-kind contribution of other State money to match the federal contribution. Completion of the surface cleanup in July of

1983 mooted the government's request for injunctive relief.[1]

On June 10, 1983, the generators moved for summary judgment on a variety of statutory and constitutional grounds.[2] The United States in turn moved for partial summary judgment (on liability issues only) against the generators, landowners, and site operators. After hearing argument, the district court granted partial summary judgment holding each of the defendant generators jointly and severally liable by Order dated February 21, 1984. The court found that the harm at the site was indivisible and not capable of apportionment, and that the liability of the defendants was therefore joint and several. Petition, E-11 & E-12.

Cross motions for summary judgment on the issue of appropriate costs were filed. In their motion of summary judgment and memorandum in support of motion for summary judgment, both dated February 17, 1984, defendant generators moved that allowable costs be reduced by the amount paid by Eaton Corporation, which settled during proceedings before the district court, and by "amounts paid in the future by others . . ." The district court found that defendants had failed to present any disputed issue of material facts regarding costs. The court concluded that the plaintiffs could recover their legal, administrative, and investigative costs related to the Bluff Road cleanup. The district court noted that the total cost figure submitted by plaintiffs reduced the total by the amount received in settlement from Eaton Corporation. See order dated November 22, 1985, Joint Appendix 687-695. By Order dated December 19, 1985, the district court approved a settlement with Columbia Organic Chemical Company, a named defendant, and specifically stated that the amounts due plaintiffs would be reduced by the amount of the settlement. Petition, F-2. A final order was issued August 15, 1986 (Petition, G-1 through G-3), and a final judgment was entered on Sep-

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[1]As noted by the district court in its Final Order of August 18, 1986, at 3, Joint Appendix, 707, the instant case has dealt only with the surface cleanup. Subsurface and groundwater contamination at the site are being studied, and may form the basis for future remedial actions and claims related thereto.

[2]Shortly after the generators filed their motion, one of them, Eaton Corporation, entered into a settlement agreement with the United States and the State.

tember 23, 1986, awarding $1,561,134.55 to the United States and $252,489.46 to the South Carolina Department of Health and Environmental Control (Petition, D-1 and D-2). Thereafter, petitioners appealed to the United States Court of Appeals for the Fourth Circuit. While the appeal to the Fourth Circuit was pending, the South Carolina Department of Health and Environmental Control made a payment to the United States for reimbursement of cleanup costs at the Bluff Road site. It is agreed that the amount paid should result in a reduction of the judgment. In due course, the judgment of the district court was affirmed as to all matters before this Court, and the petition for rehearing and suggestion for rehearing en banc was denied.

REASONS FOR DENYING THE WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied. It raises no issues requiring resolution by this Court. There is no split among the various federal courts of appeals as to the issue of deferral of contribution actions in similar cases, despite petitioners' assertion that such a split is impending.

Petitioners' remaining ground for seeking certiorari is that depending on the outcome of an eventual contribution action, the impact on petitioners may be unfair or unconstitutional. It is premature for petitioners to seek review by this Court. Petitioners acknowledge that a fair and constitutionally sound result can be reached in the "two-separate-actions procedure" ordered by the trial court. Moreover, petitioners present a number of issues which were not presented to the trial court or properly preserved in the Fourth Circuit, and therefore are not properly before this Court.

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS:

Petitioners allege that the decision below portends an "impending" split among the various circuits. To date the Fourth Circuit is the only court of appeals to have ruled on the issue of deferral of contribution actions under the Comprehensive Environmental Response, Compensation and Liability

Act of 1980. ("CERCLA"), 42 U.S.C. §9601 *et seq.* (1982 and Supp. IV 1986). There is no conflict among the United States courts of appeals as to the question whether, in actions brought for response costs under Section 107 of CERCLA, the trial court is required to decide both liability for response costs and contribution in the same action. Though the petitioners, in support of their prayer for certiorari, refer to district court decisions in other circuits, Petition at 13-17, *passim*, they do not contend that other circuit courts of appeal have addressed the issue. The Fourth Circuit Court of Appeals upheld the district court order directing deferral on the facts of this case. In this case, petitioners decided not to implead other potential third-party generators in the trial court and did not pursue claims for contribution. Rather, petitioners banked their defense on arguing against the imposition of joint and several liability. Now that joint and several liability under CERCLA is well established, this defensive mode is unlikely to present itself. The issue of deferral, as presented in this case, may never be decided by any other federal courts of appeal. Clearly, there is no split among the circuits, either immediate or impending, which requires resolution by this Court.

II. NO IMPORTANT QUESTIONS OF FEDERAL LAW ARE RAISED.

A. FAILURE TO COMPLY WITH RULE 54(b), FEDERAL RULES OF CIVIL PROCEDURE, WAS NOT PRESERVED BELOW.

Petitioners' Question I relates to compliance with Rule 54(b). The trial court's alleged failure to comply with Rule 54(b) was not raised before the trial court and was not presented as an issue on appeal to the Fourth Circuit. There is no reference to Rule 54(b) in petitioners' primary brief before the Fourth Circuit. Rule 54(b) is raised in passing in the petitioners' joint reply and answering brief, at p.18, note 24, and at 21. There, petitioners argued that the district court's "failure to adjust the plaintiff's recovery as a result of their own liability" was error under Rule 54(b). However, in their motion for summary judgment on costs and supporting memorandum, petitioners asked only for reduction in plaintiffs' recovery by the amount of Eaton Corporation's settlement and amounts

paid in the future by others. See Motion for Summary Judgment, February 17, 1984, and Memorandum in Support of Motion for Summary Judgment, February 17, 1984. Not having been preserved below, the issue is not properly before this Court. *Youakim v. Miller,* 425 U.S. 231, 234 (1976); *Lawn v. United States,* 355 U.S. 339, 362, n. 16 (1958); *Duignan v. United States,* 274 U.S. 195, 200 (1927).

Moreover, petitioner's contention that there was a failure to comply with Rule 54(b) is faulty. The district court ruled upon all claims presented. Petitioners did not move before the trial for any adjustment of recovery other than a reduction for amounts paid by Eaton Corporation and other future payments. See Motion for Summary Judgment, February 17, 1984, and Memorandum in Support of Motion for Summary Judgment, February 17, 1984. Adjustment was made for the amount paid by Eaton Corporation, Order dated November 22, 1985; Respondent's App. A-4; and for the amount paid by at least one additional settling party, Order dated December 19, 1985, Petition, F-1 and F-2. Petitioners never pressed before the trial court for any further reduction or contribution. They cannot fault the trial court for not granting such relief.

B. DEFERRAL WILL PRESENT NO PREJUDICE.

Petitioners argue that the trial court's deferral of proceedings that would determine relative contribution from its grant of summary judgment as to liability and response costs constitutes prejudicial error requiring correction by this Court. Petitioners did not resist the issue of deferral in the trial court, nor did petitioners present to the trial court any claims of prejudice by reason of having to bring their contribution claims in a separate action.

In this case, the defendant generators had abundant opportunity, beginning in July, 1982, to pursue contribution claims by filing third party complaints against other potentially responsible parties. Yet between 1982, and January 1984, when summary judgment was rendered, neither Monsanto nor Allied-Signal, Inc., attempted to file third party complaints against other private generators of waste. While it is true that EM Industries, Inc., brought a third-party action against one third-party defendant and its subsidiary, the petitioners neglected to implead any of the other available potentially re-

sponsible parties. Moreover, the petitioners never pressed their counterclaims against the governmental parties.

The transcript of the January 15, 1984, hearing on cross-motions for summary judgment is particularly revealing, at pages 71-73, as follows:

> [DEPARTMENT OF JUSTICE ATTORNEY] MR. PAIR: . . . [T]hey have had the option of bringing in other parties if they felt it appropriate to this lawsuit, and . . . since the time the second amended complaint was filed, which was July of '82, I believe, they have made no effort to do so, except for one, again, who brought in a third party defendant.
>
> Now, they have had access to, and they have known about the other parties. They have had access through discovery, to know who these parties were. They have continually refused to bring these parties into the suit. Now, at this point in time, here we are at summary judgment to allow a continuation for the purpose of bringing new parties in, and to go through new rounds of discovery, and the rights that would be accorded those new defendants, we think at this time is inappropriate, given the fact that these defendants have elected, up to this point in time, not to do so.
>
> * * *
>
> [ATTORNEY FOR DEFENDANT GENERATORS] MR. DIBBLE: . . . I feel that I should point out that the defendants are defending on the basis that there are indispensable parties missing from this action. It is the government's burden to bring them in as defendants. Of course, that defense would have been foreclosed had they [sic] brought them in as third party defendants.
>
> THE COURT: Is that an issue in this case?
>
> MR. DIBBLE: Well, we have raised it in our answers, yes, and all of this of course was done in the vacuum of a statute which has not been construed, and depending on your Honor's construction, we may make

> various motions to recast the action in certain forms, but what we tried to do was, in a vacuum, take every possible position that we could including the fact that this case should be dismissed for lack of indispensable parties.

It was a tactical decision by the petitioners not to maintain any third party complaints against other responsible parties and not to pursue counterclaims against the governmental plaintiffs. As stated, the generator defendants were banking their defense on arguments against the imposition of liability in the first instance and, secondly, against joint and several liability. Not until late in the course of the appeal did defendants seek to take an affirmative position in apportioning responsibility for costs or seeking contribution. The court below properly refused to allow disruption and delay in the governments' action at the eleventh hour.

It is noteworthy that even though the trial court's order granting summary judgment as to liability against petitioners was filed in February, 1984, and summary judgment as to the costs occurred in August, 1984, petitioners made no attempt during this six month period to commence third-party contribution suits. Petitioners had two extended periods of time in which to implead possible third-party defendants. Having waived the opportunity to file third-party complaints for contribution, petitioners have no basis to assert prejudice. Moreover, in generator-defendants' motion for summary judgment regarding costs, and supporting memorandum, both filed February 17, 1984, the only reduction sought by defendants was for the amount paid by Eaton Corporation and other future payments. Defendants did not pursue the relief they now complain is lacking.

As noted, petitioners still have a separate right of action for contribution available in the district court. Petitioners complain that the contribution action "may" result in an unfair or unconstitutional impact. However, petitioners acknowledge that a fair and constitutionally sound result could be reached with the procedure followed by the lower court. Petition, 21. If this occurs, petitioners will *not* be "unfairly saddled" with excessive costs. It is clear that any claim of prejudice is premature and that this case does not present issues requiring review by this Court.

C. JOINT AND SEVERAL LIABILITY WAS ESTABLISHED ON THE FACTS OF THIS CASE.

The trial court found the generator defendants jointly and severally liable for response costs. Petitioners argue in Question III that the decision below, imposing joint and several liability, incorrectly placed the burden of proof as to apportionment of liability on the defendants. Petitioners' argument relies on one sentence from the comments to the *Restatement (Second) of Torts*, §433B, at comment (d). Petitioners argue that where the plaintiffs bringing the cost recovery action also disposed of waste at the site, and thus are also potentially liable for response costs, the burden of proof regarding joint and several liability should be imposed on the plaintiffs. Nothing in the *Restatement* comment requires shifting the burden of proof in a case such as this cost recovery action. But in any event, the trial judge found that based on "undisputed facts" presented by the plaintiffs, the harm was "indivisible" and that it was "impossible to ascertain the degree of relative contribution of each substance" placed at the site. The facts upon which the lower court relied are stated in the Court's opinion. Petition, E-11 and E-12. Under the facts of this case, the trial court's reference to the "defendants' burden" can reasonably be read as a reference to the burden placed on a defendant to come forward with controverting evidence once a plaintiff has made its case. In the hearing before Judge Simons, counsel for defendants acknowledged that the record contained affidavits that "address the lack of ability to apportion" but contained no affidavit establishing the "ability to apportion." Transcript of Proceedings, January 13, 1984, at 57. While defendants may have disagreed during the hearing with the adequacy of plaintiffs' affidavits in establishing the impossibility of apportionment, the trial court made a factual finding that the evidence presented proved the harm to be impossible to apportion. Petitioners did not properly preserve their objection to this factual finding on appeal. Thus, Judge Simons' factual findings rule.

Petitioners seem to argue that §433B, comment (d), of the *Restatement* requires the plaintiff to apportion damages, even when plaintiff has proven the harm to be *indivisible* and not capable of reasonable apportionment. This argument turns the provisions of CERCLA and the *Restatement* on their heads.

The lower courts committed no error requiring correction by this Court, even under the most favorable reading of *Restatement* §433B, comment (d).

D. NO VIOLATION OF THE PRINCIPLE OF SEPARATION OF POWERS OCCURRED.

Question III, relating to separation of powers, is not properly before this Court because it was not properly raised below. Moreover, it cannot seriously be contended that a separation of powers issue exists. The courts below properly decided the procedural issue raised by petitioners. The courts ably reconciled the remedial provisions of CERCLA with the procedural provisions of the Federal Rules of Civil Procedure. The lower courts did not engage in judicial legislation in violation of the principle of separation of powers.

CONCLUSION

The plaintiff proved "by undisputed facts" that the harm at Bluff Road is "indivisible" and that "it is impossible to ascertain the degree of relative contribution" of each cause to the harm. The district court's finding of joint and several liability and its refusal to apportion damages among the defendants was correct under CERCLA and the *Restatement (Second) of Torts*. There has been no error of law. Petitioners have a right to contribution in a separate action. While petitioners are disgruntled with the trial court's deferral of any action for contribution, the petitioners acknowledge that the "two-separate-actions procedures" could lead to a fair and constitutionally sound result. In the meantime, the judgment of the district court should stand. Further delay would defeat the clearly expressed Congressional intent that response costs should be quickly refunded to replenish the Superfund. *See, e.g., Dedham Water Company v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081-1082 (1st Cir. 1986).

No conflict exists between decisions of federal courts of appeal, and petitioners have shown no error of law or prejudice to them. For the foregoing reasons, respondent South Carolina

Department of Health and Environmental Control urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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April 28, 1989
Columbia, South Carolina

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

Civil Action No. 80-1274-6

UNITED STATES OF AMERICA,
Plaintiff,
and

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,
Plaintiff-Intervenor,

v.

SOUTH CAROLINA RECYCLING AND DISPOSAL, INC.; COLUMBIA ORGANIC CHEMICAL COMPANY; OSCAR SEIDENBERG; HARVEY HUTCHINSON; MONSANTO COMPANY; ALLIED CORPORATION; AQUAIR CORPORATION; and EM INDUSTRIES, INC.,
Defendants,

v.

G. D. SEARLE & CO., and WILL ROSS, INC.,
Third-Party Defendants.

ORDER

Filed
November 22, 1985

This action was brought by plaintiff United States pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, to recover costs of removing hazardous substances from the surface of the Bluff Road site, a hazardous waste site located near Columbia, South Carolina. The State of South Carolina entered the action as plaintiff-intervenor and also seeks to recover costs associated with the Bluff Road site.

On February 21, 1984, this court entered Summary Judgment against all defendants except Columbia Organic Chemical Company ("COCC"), holding the defendants jointly and severally liable for costs incurred by the federal and state governments in cleaning up the Bluff Road site. After a bench trial on the issue of COCC's liability, this court entered an Order on August 28, 1984, finding COCC jointly and severally liable. The Orders of February 21, 1984 and August 28, 1984 did not treat the amount of recovery to which plaintiffs are entitled because the complexity of the cleanup hindered plaintiff's efforts to assemble adequate cost data.

Now before the court are Motions for Summary Judgment filed by plaintiff and plaintiff-intervenor as well as Cross-Motions for Summary Judgment filed by defendants Monsanto Company, Allied Corporation, Aquair Corporation, and EM Industries, Inc. on the issue of the recovery available under CERCLA.[1] Defendants argue that the court should limit the plaintiffs' recovery to $424,000.00, representing the difference between the $519,000.00 paid by the government to the contractor which performed the cleanup of the site and the $95,000.00 received in settlement from former defendant Eaton Corporation.[2] The government contends that, in addi-

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[1]COCC joined in these defendants' Motion after it was filed.

[2]Defendants mischaracterize the relief in question as "damages." The term "damages" is ordinarily associated with legal remedies. Not only does § 107(a) of CERCLA refer to "costs" rather than "damages", but the type of relief authorized by the statute is equitable restitution—a remedy designed to return plaintiffs to the finacial position they were in before incurring cleanup costs. *See* Porter v. Warner Holding Co., 328 U.S. 395 (1946); United States v. Long, 537 F.2d 1151, 1153-54 (4th Cir. 1975), *cert. denied*, 429 U.S. 871 (1976). *See also* United States v. Northeastern Pharmaceutical and Chemical Company, Inc., 579 F.Supp. 823 (W.D.Mo. 1984).

tion to amounts paid to the cleanup contractor, discounted by the Eaton settlement, it is entitled under CERCLA to recover administrative, investigative, and legal costs associated with the cleanup and this litigation. Plaintiffs also urge that the government is entitled to prejudgment interest.

In the main, this court finds plaintiffs' legal arguments persuasive and, therefore, denies defendants's motions. Moreover, reviewing the record in a light most favorable to defendants, this court concludes that there are no material issues of fact in dispute with respect to the amount of costs incurred, and that, therefore, Summary Judgment should be granted in plaintiffs' favor on the issue of costs. For reasons noted later in this Order, the court concludes that the facts of this case do not warrant the imposition of pre-judgment interest.

BACKGROUND

In June of 1984, before filing its Motion for Summary Judgment, the United States delivered to each defendant a detailed summary of the United States' costs relating to the Bluff Road cleanup. Defendants were informed that the documents underlying the summary were voluminous but would be made available for inspection upon request by defendants, and that the United States would consider any corrections, modifications, or comments that defendants might have in determining the final cost figure for the Bluff Road cleanup. In August of 1984, the United States, having received no requests, challenges, or comments from defendants relating to the cost summary, filed for Summary Judgment on the issue of costs. Attached to the United States' Motion was the cost summary delivered to defendants for comment.

At a hearing on August 28, 1984, the United States supplemented its Motion with affidavits of record custodians from both the United States Enviromental Protection Agency and the United States Department of Justice. Over objection by defendants, the court received the United States' cost summary and supporting affidavits as evidence.[3] The South Caro-

[3] In this court's view, the cost documents which underlie the government's cost summary are records of regularly conducted activity, which are subject to the hearsay exception provided by Fed.R.Evid. 803(6). The Federal Rules recognize the utility and

lina Department of Health and Environmental Control ("the State") also sought payment of administrative expenses associated with the Bluff Road cleanup.[4] The court granted defendants an additional sixty (60) days in which to conduct discovery of plaintiffs' underlying cost information for the purpose of plaintiffs' underlying cost information for the purpose of identifying issues of fact. Defendants were given fifteen (15) days after expiration of the discovery period to bring any issues of fact to the court's attention. Although the court is aware that some limited discovery was undertaken by defendants, defendants have not filed papers with the court showing a disputed issue of material fact within the requisite time frame.

Thus, in the absence of a showing of disputed issue of material fact, the court accepts plaintiffs' statement of costs incurred as true and accurate.

The United States initially stated costs of $1,157,242.89 in its cost summary. In papers subsequently filed with the court, the United States adjusted that figure, reducing an amount that had been overstated in the summary, calculating in an amount listed in the summary as committed but not yet paid, which was subsequently paid, and reducing the total by the amount received in settlement from Eaton Corporation. The United

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admissibility of evidence summaries in circumstances such as this:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

Fed.R.Evid. 1006. Pursuant to Rule 1006, summaries of evidence should be admissible whenever the underlying evidence would itself be admissible. *See* Ford Motor Co. v. Auto Supply Co., Inc., 661 F.2d 1171 (8th Cir. 1981); United States v. Foley, 598 F.2d 1323 (4th Cir. 1979); United States v. Consolidated Edison Co., Inc., 580 F.2d 1122 (2nd Cir. 1978). Because plaintiff's cost exhibit summarizes admissible documentary evidence and was properly authenticated by custodial affidavits, the summary and affidavits were admitted as evidence.

[4]The State followed up its demand at the hearing with a Motion for Summary Judgment filed September 18, 1984.

States' adjusted cost figure is $1,065,910.92.[5] This figure represents the cost of the cleanup itself, as well as administrative, investigative, and legal expenses associated with the cleanup and recovery of the federal government's costs. The State claims an additional $93,000 in administrative expenses which were not reimbursed by the federal government. Because the court accepts these cost figures as true, the only inquiry remaining is whether the government is entitled, as a matter of law, to recover all of these costs.

SCOPE OF RECOVERY

Persons held liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), are responsible for "*all costs of removal or remedial action* incurred . . . *not inconsistent with* the national contingency plan ["NCP"] . . ." (Emphasis added). The statute limits the grounds for contesting government costs to the issue of consistency with the NCP, and places the burden of proof with respect to that issue on defendants. A recent decision in *United States v. Northeastern Pharmaceutical and Chemical Company, Inc.*, ("NEPACCO"), 579 F.Supp. 823 (W.D.Mo. 1984), is persuasive in this regard:

> Defendants argue that the plaintiff failed to prove that the costs incurred were reasonable and "not inconsistent with the national contingency plan." Initially, the Court finds that the burden of proving inconsistency with the national contingency plan was that of the defendants. This conclusion is evident from the language of the statute. To give meaning to every term in the statute, the Court reads the insertion of the word "not" immediately prior to "inconsistent" to mean that the defendants are presumed liable for all response costs incurred *unless* they can overcome this

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[5]The figure does not include some expenses which are as yet incalculable. Specifically, the degree to which the federal and state governments will reimburse the cleanup contractor for cost overruns has not yet been resolved, and the amount of administrative expense incurred by the State and reimbursed by EPA has not been calculated. Moreover, federal administative and legal costs which have accrued from March of 1984, the date of the United States' last computations, up until the date of this judgment have not yet been calculated.

> presumption by presenting evidence of inconsistency. The content of section 107(a) (4) (B) lends support to this conclusion in stating that responsible parties are liable for "any other costs of response incurred by any other person *consistent with* the national contingency plan. . . ." (emphasis added). On its face, section 107(a) (4) (B) intends that a different standard apply to cost recovery by nongovernmental entities and that such entities must affirmatively show that their actions were consistent. . . . Congress had already made provision for the reasonableness of actions taken by the government. . . . Reasonableness is conclusively presumed to have been built into the plan. . . . As long as the actions taken by the government were in harmony with the national contingency plan, the costs incurred pursuant to those actions are presumed to be reasonable and therefore recoverable. If Congress had intended otherwise, they would have merely stated in section 107(a) (4) (A), "all reasonable costs," instead of the present language of "all costs."

Id. at 850-51. In this case, defendants have failed to prove that any of plaintiffs' costs were inconsistent with the NCP and have not identified any issue of fact with respect to those costs. Consequently, all costs within the scope of recovery under Section 107(a) of CERCLA will be allowed.

In *NEPACCO*, the Honorable Russell G. Clark concluded that CERCLA specifically allows for the recovery of all litigation costs, including attorney fees, and administrative and investigative costs associated with cleanups. *Id.* at 851-52. While this court is not without some misgivings about awarding attorney fees to the government for the services of its own lawyers, the broad language of the statute and the cogency of Judge Clark's comments in the *NEPACCO* opinion are persuasive. As noted above, under Section 107(a) of CERCLA, responsible parties are liable for "all costs of removal or remedial action. . . ." 42 U.S.C. § 9607(a). "Remove" or "removal" is defined by Section 101(23) of CERCLA to include "action taken under Section 9604(b). . . ." 42 U.S.C.

§ 9601(23). That provision, in turn, provides, in pertinent part, as follows:

> Whenever the President is authorized to act pursuant to subsection (a) of this section . . . [he] may undertake such *planning, legal,* fiscal, economic, engineering, architectural, and *other studies or investigations* as he may deem necessary or appropriate *to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.*

42 U.S.C. § 9604(b) (emphasis added). Because the response actions at the Bluff Road site were taken pursuant to Section 104(a) of CERCLA, this court concludes that all costs associated with the cleanup and this litigation are recoverable.

Plaintiffs seek an award of prejudgment interest on these amounts. The parties agree that CERCLA does not specifically address the issue of prejudgment interest. In the absence of express statutory provision, the question must be resolved by the courts. This court recognizes that some CERCLA actions may present circumstances in which an award of prejudgment interest is appropriate. *See NEPACCO,* 579 F. Supp. at 852. In this case, however, there is no indication that the defendants have been recalcitrant, deceptive or unreasonable. Moreover, defendants have not sought to delay either the cleanup activities or the progress of this case. Under such circumstances, this court declines to award prejudgment interest.

Accordingly, defendants are hereby adjudged liable, jointly and severally, to the United States in the amount of $1,065,910.92 and to the State in the amount of $93,000.00. The court understands that certain additional costs are as yet incalculable, and, therefore, grants plaintiffs sixty (60) days to file and serve affidavits supplementing the amount of the judgments entered hereby. Defendants are directed to file any opposing affidavits or other evidence concerning such additional costs within 30 days after plaintiff's affidavits are filed.

AND IT IS SO ORDERED.[6]

/s/ CHARLES E. SIMONS, JR.

UNITED STATES DISTRICT JUDGE

Aiken, South Carolina
November 20, 1985

[6]It is noted that this court has withheld executing and filing this Order for a considerable period of time awaiting the Eighth Circuit Court of Appeals' decision in *United States v. Northeastern Pharmaceutical and Chemical Company, Inc.*, 579 F.Supp. 823 (W.D.Mo. 1984) inasmuch as the court had received information that this case had been duly appealed to the Eighth Circuit. Since the Eighth Circuit has not at this time issued its Order in that case, the court has decided to go forward and execute and file the within Order.

Supreme Court, U.S.
FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1404

In the Supreme Court of the United States

OCTOBER TERM, 1988

MONSANTO COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court, having found that generators of hazardous materials are jointly and severally liable under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607, for costs of cleaning up the site where such materials were deposited, may defer the generators' contribution claims to a separate proceeding.

2. Whether, if government agencies also sent hazardous substances to the site, the defendants bear the burden under CERCLA of establishing that joint and several liability is inappropriate because the harm at the site is divisible.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B30) is reported at 858 F.2d 160. The opinion of the district court (Pet. App. E1-E19) is reported at 653 F. Supp. 984.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1988. A petition for rehearing was denied on December 2, 1988 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on February 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action brought by the United States and the State of South Carolina under the Comprehensive En-

vironmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover from petitioners and others costs incurred by the federal and state governments in cleaning up the surface of an abandoned hazardous waste site near Columbia, South Carolina. Under CERCLA Section 104, 42 U.S.C. 9604 (1982 & Supp. IV 1986), the United States may expend funds from the Hazardous Substances Superfund (Superfund) to abate an actual or threatened release of a hazardous substance and, pursuant to CERCLA Section 107, 42 U.S.C. 9607 (1982 & Supp. IV 1986), bring suit against certain "covered persons" to recover those costs.

1. This litigation concerns the "Bluff Road" hazardous waste site, which was operated by South Carolina Recycling and Disposal, Inc. (SCRDI), and a predecessor company from 1973 to 1980. Each of the petitioner companies contracted with SCRDI for the treatment or disposal of hazardous wastes during this period. As a result of haphazard disposal and storage procedures followed at the site, "an environmental hazard of staggering proportions developed." Pet. App. E4; see *id.* at B5-B6.

In 1980, the United States Environmental Protection Agency (EPA) investigated the site and concluded that it posed a major threat to the environment. Later that year, pursuant to Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973, the United States filed suit for injunctive relief against an owner of the site and two lessees who had operated the waste disposal business there. The State of South Carolina intervened as a plaintiff. During discovery, the United States identified a number of waste generators, including petitioners, several federal agencies, and one state agency, that had arranged for disposal of hazardous substances at the site. An agreement was reached with 12 generators and one transporter

of waste to perform 75% of the surface cleanup of the site.[1] Pet. App. B7, E4.

2. Following completion of the initial surface cleanup, the United States filed an amended complaint in 1982 against five non-settling generators, including petitioners, two landowners, and two companies that had leased the property in order to operate the waste disposal business. The amended complaint added counts for injunctive relief and cost recovery under CERCLA. The State completed the remaining 25% of the surface cleanup using federal Superfund monies and state matching funds. Pet. App. B7-B8, E4.

The district court granted the governments' motion for summary judgment against petitioners. The court concluded that petitioners were liable parties under CERCLA Section 107(a)(3) because (1) "each * * * made arrangements with [the site operator] for disposal or treatment of wastes containing hazardous substances and * * * such wastes were shipped to the site"; (2) "hazardous substances like those of each * * * were present at the site at the time of cleanup" (3) "there were releases and threatened releases of hazardous substances at the site"; and (4) "the government incurred costs in responding to those releases and threatened releases." Pet. App. E8-E9.

The court also ruled that petitioners were jointly and severally liable (Pet. App. E10-E13). The court found that

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[1] We have been informed by the federal government's trial counsel that the government agencies that sent wastes to the site also have contributed the following amounts to the Superfund:

AGENCY	PAYMENT
EPA —	$51,975.00
Air Force	15,675.00
Army	5,500.00
Center for Disease Control	11,275.00
South Carolina Dep't of Health and Env'tl Control	6,000.00

"[b]ecause of the deleterious condition of the site at the time of the cleanup, it is impossible to divide the harm in any meaningful way" (*id.* at E11). The court rejected petitioners' claim that the harm was divisible because it was subject to rough apportionment based on the responsible parties' relative volumetric contributions. "Such arbitrary or theoretical means of *cost* apportionment," the court reasoned, "do not diminish the indivisibility of the underlying harm, and are matters more appropriately considered in an action for contribution between responsible parties after plaintiff has been made whole" (*id.* at E12). The court consequently ordered petitioners to pay the United States and South Carolina the costs of their removal actions at Bluff Road, or $1,561,134 and $252,489, respectively (Pet. App. G2).

3. The court of appeals affirmed (Pet. App. B1-B30). The court of appeals agreed with the district court that petitioners were liable parties under CERCLA (Pet. App. B15-B17). The court concluded that petitioners had failed "to produce specific evidence creating a genuine issue that all of their waste was removed from the site prior to the release of hazardous substances there" (*id.* at B18). The court of appeals also concluded that petitioners had failed to carry their burden of establishing that there was a reasonable basis for apportioning the harm (*id.* at B20-B21). The court explained, moreover, that petitioners were free to pursue contribution claims against the other responsible parties, including governmental entities, and that the district court had not abused its discretion by not retaining the action to dispose of contribution questions (*id.* at B22).

Judge Widener dissented (Pet. App. B28-B30). He concluded that the district court was required to retain the claims pertaining to allocation of cleanup costs (*ibid.*).

Judge Widener concurred in the majority opinion in all other respects (*id.* at B28).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. There is no merit to petitioner's contention (Pet. 13-24) that the district court erred by not resolving their counterclaims for contribution against the government and other allegedly responsible parties. The district court acted properly. Petitioners had essentially abandoned those claims in the proceedings before that court, but, in any event, the court's action was consistent with Congress's desire to ensure EPA's rapid recovery of costs for reinvestment at other CERCLA sites.

a. Although petitioners' answers to the complaints filed by the state and federal governments included a claim against those governments in their capacity as waste generators, petitioners never pursued those claims in that court. Nor, with one exception,[2] did petitioners ever pursue claims against any other allegedly responsible party. During the two and one-half years between the district court's declaration that defendants were jointly and severally liable (Pet. App. E19) and the final order (Pet. App. G3), petitioners never contended that their liability should be reduced because of the participation of the government or others in arranging for the disposal of

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[2] Petitioner E.M. Industries asserted a third-party claim against G.D. Searle & Co. and Will Ross, Inc., which the district court rejected on its merits. See *United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1010-1013 (D.S.C. 1984).

wastes at Bluff Road. The district court therefore can hardly be faulted for treating petitioners' claims as effectively abandoned.[3] And, for this reason, this case does not present a proper vehicle for considering the issue raised by the petition, which is whether the district court erred by postponing consideration of petitioners' counterclaim to a later separate action for contribution. See South Carolina Dep't Health & Env'tl Control Br. in Opp. 10-12.

b. In any event, the court of appeals' ruling that there would have been nothing wrong with such a postponement is correct and raises no issue warranting this Court's review. Congress intended for CERCLA Section 107 to provide an expeditious means for recovery of CERCLA funds expended in cleaning up hazardous waste sites. See H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17 (1980). Timely cleanup of sites contaminated with hazardous substances requires expeditious disposition of claims brought under Section 107 to recover previously expended sums. For this reason, other courts, like the district court here (Pet. App. E13 & n.8), have regularly concluded that

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[3] Even though the court of appeals read the district court's order as deferring consideration of petitioners' counterclaims to a later action, that would not preclude a determination that the claims were abandoned. Indeed, we believe the district court treated the claims as abandoned. The district court's final order (Pet. App. G3) expressly ruled that the government's claims regarding subsurface and groundwater contamination would be heard in a subsequent action. Had the court intended similarly to defer the petitioners' contribution claims, the court presumably would have mentioned those claims in that same order. The language in the district court opinion (Pet. App. E12-E13 n.8) to which the court of appeals referred (see Pet. App. B22) was not addressing the viability of petitioners' contribution claims. The district court was there responding only to petitioners' generic claim that the harm at the site was divisible because there existed "means of roughly apportioning the costs of cleanup" (Pet. App. E12).

entry of judgment with respect to the threshold liability question should not be delayed pending resolution of the type of complex apportionment issues that frequently accompany CERCLA litigation. See, *e.g.*, *O'Neil* v. *Picillo*, 682 F. Supp. 706, 725-726 (D.R.I. 1988), appeal pending, No. 88-1551 (1st Cir.) ("[b]y delaying thorny considerations of equitable apportionment to a later contribution proceeding, the government is provided immediate funds after the initial liability hearing to take prompt remedial action at the earliest opportunity"); *United States* v. *Stringfellow*, 661 F. Supp. 1053, 1060-1061 (C.D. Cal. 1987).

In adopting the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, Congress reaffirmed that apportionment issues should not interfere with EPA's ability to achieve rapid recovery of Superfund costs for reinvestment at other sites. SARA added an explicit authorization for contribution actions in Section 113(f), 42 U.S.C. 9613(f) (Supp. IV 1986).[4] The House Judiciary Committee explained that this amendment was intended "to ratify current judicial decisions that the courts may use their equitable powers to apportion the costs of clean-up among the various responsible parties involved with the site." H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 3, at 18 (1985). The Committee cautioned, however, that "after all questions of liability and remedy have been resolved, courts may consider any criteria relevant to determining whether there should be an apportionment" (*id.* at 19).

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[4] Even prior to SARA's enactment, courts had held that contribution among responsible parties was an integral part of CERCLA's scheme of joint and several liability. See, *e.g.*, *Colorado* v. *ASARCO*, 22 Env't Rep. Cas. (BNA) 1926 (D. Colo. 1985); *Wehner* v. *Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985).

Contrary to petitioners' submission (Pet. 13-15), the principle that apportionment issues should not be allowed to interfere with governmental enforcement applies with equal force where, as here, government agencies are allegedly liable parties. Section 113(f) affirms that liable parties may seek contribution against "any other person who is liable or potentially liable under section 9607(a) * * *." Section 101(21), 42 U.S.C. 9601(21) (1982 & Supp. IV 1986), includes the United States and the State in the definition of "person", and Section 120(a), 42 U.S.C. 9620(a) (Supp. IV 1986), specifically makes "[e]ach department, agency, and instrumentality of the United States" subject to CERCLA, "including liability under section 9607 of this title." In addition, Section 113(f), 42 U.S.C. 9613(f) (Supp. IV 1986), added to the statute by SARA, provides that a person may seek contribution from any other potentially liable person "*during or following* any civil action under * * * section 9607(a) of this Title" (emphasis added).

The legislative history confirms, moreover, that Congress intended federal and state[5] agencies to be treated like private entities for purposes of contribution actions. See H.R. Rep. No. 253 *supra*, Pt. 3, at 19, 20 (apportionment issues are to be resolved "after all questions of liability and remedy have been resolved" and "[t]he right of the United States to proceed under section 106 or 107 is unaffected by its status as an owner or operator of a facility or a generator of waste at the site"). That history also shows that Congress intended to give the courts discretion to defer contribution claims to a separate action. See 131

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[5] The Court is currently considering the question whether Congress intended CERCLA to abrogate the States' Eleventh Amendment immunity in *Pennsylvania* v. *Union Gas Co.*, cert. granted, 108 S. Ct. 1219 (1988).

Cong. Rec. 24,450 (1985) (remarks of co-sponsor Sen. Stafford) ("As a general rule, private party cleanup will occur more quickly if the courts first resolve issues of liability and remedies concerning the original defendants, leaving questions of apportionment until after the Government's action has been completed. Nonetheless, consistent with the Federal Rules of Civil Procedure, these decisions are left to the discretion of the court."); H.R. Rep. No. 253 *supra*, Pt. 1, at 80 (emphasis added) ("This provision [providing an explicit right of contribution] allows all counterclaims, cross-claims and third-party actions to be dealt with in a single action *if the court is so inclined.* District courts should carefully manage cases filed pursuant to this section to insure that the litigation is conducted in an expenditious [sic] manner and is not unduly delayed by the concurrent maintenance of third party actions.").[6]

Hence, the statutory language and legislative history refute petitioners' suggestion that Congress intended a different rule to apply in cases in which the government itself sent waste to the site that is the subject of the government's enforcement action. It is not surprising, therefore, that petitioners fail to refer to any specific evidence in either to buttress their claim that courts are required in those cases

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[6] For this reason, petitioners are not aided by Congress's decision to eliminate from an earlier version of SARA a prohibition on the bringing of any contribution action prior to entry of judgment in the government's enforcement action. See Pet. 16-17, citing S. 51, 99th Cong., 1st Sess. § 126 (1985). Congress eliminated that prohibition based on the belief that early filing of contribution claims might encourage settlements by bringing all liable parties to the bargaining table. See, *e.g.*, 131 Cong. Rec. 24,450 (1985) (remarks of Sen. Stafford). As described in the text above, however, congressional committees and sponsors simultaneously made clear that district courts would retain discretion to postpone consideration of contribution claims.

to consider such claims against the government as a defense to liability rather than as a claim in contribution.[7]

Contrary to the fears expressed by petitioners (Pet. 17-24), moreover, district courts can exercise this discretion in a manner that fulfills the statutory purposes and avoids unfairness. Where unfairness would otherwise result, a district court could simply bifurcate the government's case-in-chief and contribution claims, instead of deferring contribution issues to a subsequent action. In this case, however, there is no unfairness because, as the court of appeals explained (Pet. App. B22), petitioners "still have the right to sue responsible parties for contribution, and in that action they may assert both legal and equitable theories of cost allocation." Petitioners' contrary view, which is that postponement "substantially increased the likelihood that [petitioners] will never be able to obtain sufficient contribution" (Pet. 18), is based on a series of speculative contingencies. Indeed, petitioners acknowledge (Pet. 21), as they must, that the district court's two-

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[7] Petitioners' belated reliance (Pet. 15-16) on Fed. R. Civ. P. 54(b) is unavailing. That Rule does not purport to address the issue whether petitioners' claim against the United States must be treated as a defense to petitioners' liability rather than as a separate claim. It instead delineates the circumstances under which a district court may render final judgment as to one claim in a case raising multiple claims so that an immediate appeal may be taken from the court's ruling. See generally *Curtiss-Wright* v. *General Electric Co.*, 446 U.S. 1, 8-11 (1980). Moreover, even if petitioners are correct that the district court was required to make an express determination "that there is no just reason for delay," the remedy would have been dismissal of their appeal to the court of appeals for lack of jurisdiction, leaving the district court free on remand to make such a determination. In any event, because the district court was treating petitioners' counterclaims as abandoned (see note 3, *supra*), no such Rule 54(b) finding was necessary.

action procedure may "attain the same result" as the single action procedure they prefer.[8]

Finally, review is not warranted because there is no circuit conflict requiring this Court's attention. No other court of appeals has embraced petitioners' legal argument. Indeed, as petitioners concede (Pet. 24), "the Fourth Cir-

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[8] There is no merit to petitioners' suggestions (Pet. 21-23) that their liability in this case is "grossly disproportionate," "punitive," and "unlimited." As the court of appeals explained (Pet. App. B22 n.28), petitioners and the other defendants were found liable for slightly less than half of the total costs incurred in the surface cleanup, while petitioners produced approximately 22% of the waste that the site operator handled. As the court further explained (*ibid.*), a substantial part of that liability is attributable to litigation costs, which are recoverable under CERCLA. See *United States* v. *Mottolo*, 695 F. Supp. 615, 631 (D.N.H. 1988); *United States* v. *Northernaire Plating Co.*, 685 F. Supp. 1410, 1418 (W.D. Mich. 1988). Although petitioners were entitled to contest their liability, they cannot now complain that the resulting increase in the amount of the judgment is "punitive."

Nor is there any unfairness in the court of appeals' ruling (Pet. App. B22 n.29) that it would be premature to interpret the effect of settlements on petitioners' rights in a later contribution action, especially because petitioners did not press their contribution claims in the district court and, consequently, that court never discussed those claims. In any event, contrary to petitioners' contention (Pet. 19-21), this is not an appropriate case for resolving the effect of CERCLA settlements on the rights of non-settlers. Petitioners' claims (Pet. 20) of double recovery are unfounded. For instance, the order entering the consent decree between the plaintiffs and Columbia Organic Chemical Co., like the earlier settlements in this case, explicitly provided (Pet. App. F2) that the agreed settlement would reduce the total amount due the governments. Although similar express language was not included in the settlement with AquAir Corp., entered while this case was on appeal, that settlement will necessarily reduce the liability of petitioners pursuant to 42 U.S.C. 9613(f)(2) (Supp. IV 1986) (settlement "reduces the potential liability of the others by the amount of the settlement").

cuit is the first circuit court of appeals to speak to these issues." There is also no merit to petitioners' suggestion (*ibid.*) that there is a "serious impending split among the circuits." Indeed, in none of the district court opinions cited by petitioners did the court rule on the question, raised in this case, whether a district court may properly defer contribution claims where the government has brought a cost recovery action for the replenishment of the Superfund.[9]

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[9] For instance, *Mola Development Corp.* v. *United States*, No. CV 82-0819-RMT (C.D. Cal. May 5, 1986), was not a case brought by the United States to reimburse the Superfund, but a private action brought by owners of contaminated property who sued the United States because the Army allegedly owned the property when the contamination occurred. A private action such as *Mola*, involving a plaintiff who is a potentially responsible party as site owner, is akin to a contribution action from inception. In contrast to this case, there are no competing policy reasons in that setting for expediting the case-in-chief and insulating it from complicated contribution issues.

Nor is a future circuit conflict suggested by either *United States* v. *Mottolo*, 605 F. Supp. 898, 910-912 (D.N.H. 1985), or *United States* v. *Hardage*, 26 Env't Rep. Cas. (BNA) 1049, 1052 (W.D. Okla. 1987). The district courts in those two cases refused to dismiss some counterclaims against the governmental plaintiffs based on alleged governmental involvement at the waste site. Neither opinion considered the deferral issue presented here; nor did either suggest that a district court is without discretion to favor deferral.

Lyncott Corp. v. *Chemical Waste Management, Inc.*, 690 F. Supp. 1409, 1418 (E.D. Pa. 1988), *Edward Hines Lumber Co.* v. *Vulcan Materials Co.*, No. 85C1142, *reprinted in* 6 Haz. Waste Lit. Rep. (Andrews) 12,055, 12056 (N.D. Ill. 1987), aff'd on other grounds, 861 F.2d 155 (7th Cir. 1988), and *City of New York* v. *Exxon Corp.*, 697 F. Supp. 677 (S.D.N.Y. 1988), likewise do not aid petitioners' cause. Each concerned the effect of prior settlements on the liability of remaining parties and none of them addressed the deferral issue. Finally, petitioners' reliance on *United States* v. *Shell Oil Co.*, 605 F. Supp. 1064, 1082 (D. Colo. 1985), is also misplaced. The issue there was not deferral but whether a federal agency could be joined as a defendant in a CERCLA case brought by the United States.

2. Further review is also not warranted to consider petitioners' claims (Pet. 24-27) that where, as in this case, the government also sent hazardous substances to the hazardous waste site, the government must show that the harm at the site is indivisible in order to be entitled to joint and several liability under CERCLA. The court of appeals correctly held (Pet. App. B20-B21) that petitioners bore the burden of establishing that there was a reasonable basis for apportioning the harm at the Bluff Road site among responsible parties and that petitioners had failed to make that showing. No court has ever embraced petitioners' theory that a different rule should apply under CERCLA when the government is among those who sent waste to the site that is the subject of the enforcement action.

Contrary to petitioners' charge (Pet. 27), moreover, the court of appeals' rejection of petitioners' theory does not amount to "freewheeling judicial creation of federal substantive and procedural law." Congress specifically invited the courts to determine the applicability of joint and several liability under CERCLA based on "evolving principles of common law" (126 Cong. Rec. 30,932 (1980) (remarks of Sen. Randolph)). The lower courts have, as in this case, generally concluded that joint and several liability is warranted under CERCLA when the harm is single and indivisible and that, to avoid such liability, defendants bear the burden of showing that the harm is instead divisible and capable of apportionment. See, *e.g.*, *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 810-811 (S.D. Ohio 1983); *United States* v. *Conservation Chemical Co.*, 589 F. Supp. 59, 63 (W.D. Mo. 1984); *United States* v. *Miami Drum Services, Inc.*, 25 Env't Rep. Cas. (BNA) 1469, 1474-1475 (S.D. Fla. 1986); *United States* v. *Medley*, 25 Env't Rep. Cas. (BNA) 1315, 1318-1319 (D. S.C. 1986);

United States v. *New Castle County,* 642 F. Supp. 1270, 1276-1277 (D. Del. 1986); *United States* v. *Stringfellow,* 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); *United States* v. *Bliss,* 667 F. Supp. 1298, 1312-1313 (E.D. Mo. 1987). No court has held that the burden shifts to the government if the government also sent hazardous substances to the site in question.

In enacting SARA, Congress expressly endorsed this lower court precedent (see H.R. Rep. No. 253 *supra*, Pt. 3, at 19), and, in adding an explicit statutory cause of action in contribution,[10] made clear that "the burden of proof is on the defendant or party seeking apportionment to establish that it should be granted" (*ibid.*). In describing the rights of the government to proceed against parties who, as in this case, have not entered into a settlement, a committee report further emphasized that "[t]he right of the United States to proceed under section 106 or 107 is unaffected by its status as an owner or operator of a facility or a generator of waste at the site" (*id.* at 20). Hence, SARA's legislative history not only fails to support petitioners' thesis, it contradicts it.[11]

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[10] As amended by SARA, Section 113(f)(1), 42 U.S.C. 9613(f)(1) (Supp. IV 1986), directs the courts to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." SARA also added provisions to facilitate settlement and to reduce the potentially harsh effects of joint and several liability. For instance, Section 122(e)(2), 42 U.S.C. 9622(e)(2) (Supp. IV 1986), authorizes the government to suspend initiation of litigation or a response action for a short period of time in order to receive offers of settlement from potentially responsible parties. And, under Section 122(g), 42 U.S.C. 9622(g) (Supp. IV 1986), Congress addressed the problem of *de minimis* contributors by authorizing the government to offer them early, cash-out settlements of their potential liability.

[11] Petitioners' principal support for their contrary view is an isolated comment to Section 433B of the Restatement (Second) of

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 1989

Torts (1965), which in paragraph (d) explains the burden shifting rule in terms of favoring the "proved tortfeasor" over the "entirely innocent plaintiff * * *." Contrary to petitioners' assumption, however, Congress's instruction to the courts to apply "evolving principles of common law" was not tantamount to requiring the courts to apply to CERCLA every statement and every explanation contained in the Restatement. Nor, for that matter, does the reference in comment (d) to "the proved tortfeasor" have any obvious bearing on CERCLA cases, in which the government is not required to make a traditional showing of either fault or causation (see Pet. App. B12, B16 n.17). In any event, there is no reason to treat the Superfund, for which recovery is sought, as any less "innocent" just because federal agencies contributed to the waste site. Finally, for similar reasons, petitioners' reliance on comment (e) to Restatement 433B is likewise misplaced. That comment suggests that shifting the burden of proof in a case with a large number of small contributors "may perhaps be unjust." Congress, however, has chosen to deal with the *de minimis* generator problem by directing the government to offer early, cash-out settlements (see note 10, *supra*), not by shifting the burden of proof.

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No. 88-1404

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MONSANTO COMPANY, ALLIED-SIGNAL, INC.
AND EM INDUSTRIES, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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May 26, 1989

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PETITIONERS' REPLY BRIEF

Pursuant to Rule 22.5, Petitioners respond to (1) Respondents' restatement of the questions presented, (2) their allegation that the district court treated Petitioners "claims" against the plaintiffs as "abandoned", (3) their claim for preferential treatment simply because the Government was a plaintiff and (4) the implications of both governments' disclosures of their heretofore secret settlements with each other and their agencies.

The Government's rewording of the questions presented shows that it has no substantial defense on the merits to Petitioners' arguments.

Mandatory Bifurcation

The Government recasts Petitioners' first question to imply that Petitioners argue that, as an abstract matter, courts do not have the power to mandate bifurcation of CERCLA liability and contribution issues into two separate trials. That is a straw man. Petitioners' primary argument is that where the plaintiff also contributed to the harm, the defendant may assert the plaintiff's share in causing the harm as a defense to the scope of defendant's liability. This defense is not a severable contribution claim. The court erred in treating Petitioners' partial defenses as separate "claims" which did not have to be considered prior to entry of final judgment. *See Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 743-44 (1976); 6 J. Moore, Federal Practice ¶ 54.33[2] (2d ed. 1988).

Bifurcation into separate suits was also inappropriate in this case for three other reasons. First, CERCLA actions are equitable proceedings and, as Judge Widener said in his dissent, it is the "universal and unvarying rule that the court will decide all matters in dispute and decree complete relief." Second, CERCLA § 113(f)(1) also commands that:

> . . . since the matter was brought before the district court, that court had no discretion but to decide the question. To repeat, the discretion is

> in the party to make the claim, not in the district court to defer decision.

Widener, J., dissenting, 858 F.2d at 177. Pet. App. B-29. Third, bifurcation into two separate suits was inappropriate because the plaintiffs were also "responsible parties" under CERCLA and, applying traditional principles of common law, since they did not carry the burden of apportionment, defendants should not have been held liable for all of the costs.

Petitioners' additional, "fall back," argument is that even if their assertion of plaintiffs' contribution to the harm must be regarded as a "claim," while the court had discretion to require two separate trials, its discretion was limited by the Federal Rules of Civil Procedure. The Government concedes that the court did not make the required certification under Rule 54(b), *e.g.*, "that there is no just reason for delay," prior to entry of final judgment. U.S. Br. 10 n.7. Absent this requisite determination, the judgment of the court of appeals would remain interlocutory however it might be styled. 6 J. Moore, Federal Practice ¶¶ 54.28[2], 54.42 (2d ed. 1988). The "judgment" would not be a final judgment within the meaning of the Federal Rules and the court of appeals would have lacked jurisdiction to hear the appeal, as the United States concedes. U.S. Br. 10 n.7.[1]

---

[1] The Government itself invoked the appellate jurisdiction of the Fourth Circuit in a cross-appeal not the subject of this petition. *See United States v. Monsanto*, 858 F. 2d 160, 175 (4th Cir. 1988) (Pet. App. B-26).. But it never moved to dismiss the counterclaims for contribution or referred to them in the order it drafted for the district court to which it refers. U.S. Br. 6 n.3 (referring to Pet. App. G-3). Below, the Government argued, "To the extent that the generators can be said to have presented contribution claims to the district court, they were clearly denied, without prejudice to their assertion in a later action, in the district court's order of February 23, 1984 . . . That ruling, of course, was incorporated in the final judgment." Joint Answer of the United States and South Carolina Department of Health and Environmental Control to Petitions for Rehearing and Suggestion for Rehearing in Banc, *United States v. Monsanto*, Nos. 86-1261(L), 86-1263, 86-1265 (4th Cir., filed Oct. 8, 1988), at 11 n.4. Having deferred consideration of contribution claims to a separate action in the 1984 order it drafted for the district court, the Government apparently saw no need to refer to them in the later order, which it also drafted.

Respondents struggle in separate ways to solve the Rule 54(b) dilemma that they themselves have created by their mischaracterization of Petitioners' defense as a separate claim. South Carolina asserts that the Rule 54(b) issue should not be considered because it was not raised by Petitioners when the plaintiffs moved for summary judgment on costs issues in the district court.[2] The Government asserts for the first time that the district court treated Petitioners' claims as effectively abandoned. U.S. Br. at 6 n.3, 10 n.7; *see* S.C. Br. 10. But these assertions are without support in the record.

The Government itself drafted the language in the district court's orders which the Government refers to in its footnote 3. In the Fourth Circuit, Respondents argued that the district court had deferred Petitioners' "counterclaims" to a subsequent separate contribution action. The district court's refusal to decide the contribution questions was a major subject of the briefs in the Fourth Circuit, including Petitioners' contention that such deferral was improper under Rule 54(b).[3] The Government's imaginative "abandonment" argument is simply a thinly veiled attempt to reconstruct the district

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[2] S.C. Br. 9. South Carolina also argues that defendants are not prejudiced because they did not sue third parties for contribution. S.C. Br. 10. But the plaintiffs had settled with most of the private defendants against whom the defendants might have made claims in contribution and who had made substantial contribution of wastes to the Bluff Road site. Assertion of claims against these parties would have been futile. *See* 42 U.S.C. § 9613(f)(2). Their equitable obligations are properly assigned to the plaintiffs under CERCLA § 113(f), but that is a result the plaintiffs seek to avoid by the "two trial" procedure ordered below and the settlements they reveal for the first time in their Briefs in Opposition in this Court.

[3] The Government litigates cases under CERCLA in federal district courts throughout the nation. As plaintiff, the Government frequently moves for severance and/or stay of claims for contribution and indemnity. In some cases, the Government argues (as it did here below) that the district court *must* under the statute dismiss contribution claims for trial in subsequent actions. *United States v. Distler*, No. 88-0201-L(J) (W.D. Ky. Feb. 2, 1989) (App. A-1). In other cases, the Government argues, inconsistently, that a district court *cannot* under the statute dismiss contribution claims as unripe. *United States v. Seymour Recycling Corp.*, 686 F. Supp. 696 (S.D. Ind. 1988). The United States, as a CERCLA defendant, argues *for* impleader and *against* separate trials of the CERCLA plaintiffs' claims against it. *See* U.S. Br. 12 n.9

court opinions it previously drafted in order to avoid issues, which on reflection it now finds inconvenient to address. Moreover this "abandonment" argument is inconsistent with other arguments in the Government's brief. Later the Government attempts to distinguish cases cited by Petitioners on the grounds that they do not discuss "deferral," the issue involved here, but instead involve various courts' refusal "to dismiss some counterclaims against the governmental plaintiffs based on alleged governmental involvement at the waste site." U.S. Br. 12 n.9.

The Burden of Proof

The Government would have the Court collapse Petitioners second and third questions into a single, second question in order to avoid (1) the Congressional guideline for determining when joint and several liability is appropriate under CERCLA, "principles of traditional and evolving common law," and (2) the application of the *Restatement (Second) of Torts*. All parties agree that the statute itself is silent as to when joint and several liability is appropriate and who has the burden of proof under what circumstances. Turning to the legislative history, both Petitioners and Respondents have cited the floor statement of Senator Randolph, one of the principal sponsors of the Senate compromise in 1980. Here is what Senator Randolph actually said:

> [w]e have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable.
>
> * * *
>
> It is intended that issues of liability not resolved by this act, if any, shall be governed by the traditional and evolving principles of common

---

(discussing *Mola Development Corp. v. United States*, No. CV82-0819-RMT (C.D. Cal. May 5, 1986)); *Kelly v. United States*, 23 Env't Rep. Cas. (BNA) 1500, 1503 (W.D. Mich. 1985).

> law. An example is joint and several liability. Any reference to these terms have been deleted, and liability of joint tort feasors will be determined under common or previous statutory law.

126 Cong. Rec. 30932 (1980); 126 Cong. Rec. S14964, (daily ed. November 24, 1980). Following this guidance, numerous courts have turned to *Restatement (Second) of Torts* for the governing traditional common law principles. The court of appeals below looked to Section 433A for when joint and several liability is or is not appropriate. But as Petitioners have pointed out, it failed to heed comment g to Section 433A to look to Section 433B for "the burden of proof, and the effect of failure to produce evidence justifying the apportionment." Pet. 24-26.

In trying to cope with Section 433B, the Government does not dispute the proposition that under the *traditional* common law the burden of proof of apportionment is upon the plaintiff, not the defendant, when both have contributed to the harm. Instead, it seeks to evade the traditional common law by several manuevers. First, it excises the words "traditional and" from Senator Randolph's statement. U.S. Br. 13.[4] Second, it argues for selective use of only some of the traditional principles:

> Congress' instruction to the courts to apply "evolving principles of common law" was not tantamount to requiring courts to apply to CERCLA every statement and every explanation contained in the Restatement.

---

[4] The Government also argues that the term "the proved tort feasor," in comment (d) to Section 443B has no relevance to CERCLA because "the government is not required to make a traditional showing of fault or causation." U.S. Br. 15 n.11. But "tort feasors" are the very words Senator Randolph used in the quote above when referring to the common law that was to determine when joint and several liability was appropriate under CERCLA. Furthermore, the Government's argument ignores its burden of proving the elements of statutory liability and the kind of evidence relevant to the availability of defenses which relate directly to notions of causation and fault. *See* CERCLA § 107(a)(3),(b)(3), 42 U.S.C. § 9607(a)(3), (b)(3).

U.S. Br. 14-15 n.11. But the American Law Institute in its restatements crafts the "black letter" and the comments as a seemless web. Moreover, the Government does not say what is to guide courts in this case-by-case picking and choosing among traditional common law principles. The Government's novel selective acceptance theory is quintessential "standardless delegation."

The Government's third reason why it should not bear the burden of proving apportionment where it is also a "responsible party" is that a special exception from the common law rules applicable to other CERCLA plaintiffs should be made where it is the plaintiff. This argument is "Orwellian". George Orwell in *Animal Farm* refers to the rule in that mythical land that

> All animals are equal,
> But some animals are more equal than others.

Here the Government concedes that CERCLA intends "each department, agency, and instrumentality of the United States" can be liable "persons" under the Act. But then it argues that its agencies become liable "persons" within the context of the Act's liability and contribution provisions "only after all questions of liability and remedy have been resolved." U.S. Br. 8. As support for this curious proposition, the Government refers to a statement in the House Judiciary Committee Report:

> The right of the United States to proceed under § 106 or 107 is unaffected by its status as an owner or operator of a facility or a generator of waste at the site.

U.S. Br. 8. But all this statement does is clarify that the Government's right to commence a suit is not inhibited by its own liability, *e.g.*, the Government's liability is not a complete defense analogous to contributory negligence. Moreover, as pointed out in the Petition, the Senate clearly and decisively rejected the Government's pleas for universal bifurcation of liability and contribution issues either in separate suits or separate trials in the same suit. Pet. 16-17. In any event, in the face of the clear statutory

language in CERCLA Section 113(f)(1),(2) giving "any person" a right to seek contribution from any other person who is liable or potentially liable under section 107(a), *during or following any civil action* under . . . section 107(a)," the courts have no power to consult the legislative history to insert an amendment into the text. (Emphasis added.) *Cf. Chan v. Korean Air Lines*, 109 S.Ct. 1676 (1989) (Although a treaty's drafting history might be consulted to elucidate a text that is ambiguous, courts have no power to insert an amendment into the treaty where the text is clear).

Finally, any notion that the Government can separate itself into two separate, independent entities (EPA as plaintiff "protector of the public" and EPA, the Army, and its other agencies as defendant "polluters") in a single legal proceeding has been disavowed by the Government elsewhere and rejected by this Court in other contexts. Pet. 14-15. Indeed, the "potentially liable person" referred to in the statute is the United States Government. 42 U.S.C. § 9601(21).

The Implications of the Secret Settlements

Petitioners have argued that the judgment below should be set aside because it has not been reduced to reflect settlements among the plaintiffs and other settling parties. In partial response, South Carolina reveals that it has made payment to the Government for reimbursement of response costs at Bluff Road. But it concedes "that the amount paid should result in a reduction of the judgment." S.C. Br. 8. Similarly, the Government reveals that EPA has also accepted payments from certain other federal agencies. U.S. Br. 3 n.1.

The intergovernmental settlements between the Government and South Carolina and among the governmental agencies are in addition to two settlements of which Petitioners were previously aware in which the Government accepted payment for the same costs covered by the judgment here. Pet. 19-20. The Government also concedes that these settlements "would reduce the total amounts due the governments." U.S. Br. 11 n.8. This statement is, however, misleading for two reasons. First, the amount of the judgment entered by the district court did not reflect all settlements

approved by the district court prior to entry of final judgment.[5] Second, the Government now reveals that it has accepted payment from its own federal agencies. Thus, it will attempt to block Petitioners from recovering payments from these agencies in the contribution action which the Government below maintained was available. U.S. Br. 3 n.1.[6] The attempt to obtain double recoveries and to avoid court determination of the fair shares of the Government departments and agencies as waste generators through self-dealing is flatly contrary to the statute, *see* 42 U.S.C. § 9614(b), and equitable principles.

Part I, C of the Petition discusses the likely consequences to Petitioners of the "two actions" procedure forced on them by the district court. The bottom line is that they probably will end up saddled with far more than their fairly apportioned share of liability. The Respondents off-the-record intergovernmental settlements make this result virtually inevitable.[7]

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[5] The district court entered a settlement between the Government and Columbian Organic Chemical Company specifically stating that claims against the other defendants would be reduced by the amount of the settlement. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1010 (D. S.C. 1985). Although the United States represents that such a reduction occurred, U.S. Br. 11 n.6, an examination of the accounting of costs on which the final judgment was calculated and the amount of that judgment clearly demonstrates that no such reduction occurred. The settlement with AquAir Corporation entered by the Fourth Circuit without any hearing, though one had been requested by Petitioners, dismissed the judgment against AquAir for $1,561,134.55 in exchange for a payment of $5,000, without reduction of the judgment against Petitioners. Pet. 19; S.C. Br. 8.

[6] Joint Answer of the United States and South Carolina Department of Health and Environmental Control to Petitions for Rehearing and Suggestion for Rehearing in Banc, *United States v. Monsanto*, Nos. 86-1261(L), 86-1263, 86-1265 (4th Cir., brief filed Oct. 7, 1988), at 8 n.1 ("Where governmental agencies resolve their responsibility to reimburse the Superfund they would be entitled to contribution protection, 42 U.S.C. 9613(f)(2) . . . .").

[7] The Government argues that, "Contrary to the fears expressed by Petitioners . . . district courts can exercise this discretion in a manner that . . . avoids unfairness where unfairness would otherwise result, a district court could simply bifurcate the Government's case-in-chief and contribution claims,

Respondents take the position that they can enter into "administrative" settlements between their "potentially responsible" agencies and thereby extinguish contribution claims against them.[10] While respondents asserted this position in the Fourth Circuit, they did not advise the court or Petitioners of all such settlements. Yet the lynchpin of the majority opinion's reason for denying or not addressing the constitutional arguments raised below was the court's assumption that "the Respondents still have the right to sue responsible parties for contribution and in that action may assert both legal and equitable theories of cost allocation." Pet. App. B-22. Elsewhere in the opinion, unaware of the off-the-record settlements, the court also stated:

> We also observe that the EPA has contributed upwards of $50,000 to the Bluff Road cleanup, and that any further claims against EPA and other responsible government instrumentalities may be resolved in contribution action pursuant to CERCLA section 113(f).

Pet. App. B-22 n. 28.

The net effect of the opinion below and the off-the-record intergovernmental settlements is likely foreclosure of any "opportunities for contribution . . . as well as joinder or interpleader of responsible parties" cited by the majority below as a means of preventing transformation of an "otherwise constitutional obligation into one that exacts punishment." Pet. Br. App. B-25, 26 n.33.

---

instead of deferring contribution to a subsequent action." U.S. Br. 10. What the Government fails to note is that avoidance of unfairness is the precise reason why Rule 54(b) requires a court to find that "there is no just reason for delay" *before* it can require bifurcation into two separate actions. Here it could not have made such a finding because it needed to maintain control of the award of the amount of damages so that it could adjust that amount in light of its apportionment of responsibility for the harm *later in the same proceeding*.

[8] *See* note 6, *supra*.

Conclusion

The decision below and the newly revealed intergovernmental settlements portend the ultimate incidence of grossly disproportional liability in this case and in future CERCLA cases. These discriminatory results are contrary to the equitable allocation of CERCLA liability Congress intended. In extreme circumstances, if the ultimate incidence bears no rational relationship to a defendant's fairly allocated contribution to the harm, it may be unconstitutional. Pet. 21-23. *Cf. United States v. Halper*, 109 S.Ct. 1892 (1989) (discussing the constitutional line between permissible civil remedy and prohibited punishment).

Respectfully Submitted,

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Thomas E. Knauer

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES,

PLAINTIFF,

CIVIL ACTION
No. 88-0201 L(J)

v.

DONALD E. DISTLER, et al.,

DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This matter is before the court on the motion of Kurfees Coatings, Inc. ("Kurfees") to file a third-party complaint. The United States brought this action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607 (1988), to recover costs expended in remedying improper disposal of hazardous wastes in Hardin County, Kentucky. Jurisdiction is proper pursuant to 28 U.S.C. § 1345 (1988).

Kurfees contends that in 1984 it bought the assets of Louisville Coatings, Inc. As part of the sale agreement, Louisville Coatings warranted there was no litigation or governmental investigation pending nor any known basis for any litigation or investigation. Kurfees contends that Louisville Coatings is liable for contribution or indemnity of any claim against them, either because of the contract or because any wrongful acts were committed by Louisville Coatings. It seeks to add a third-party claim against them.

The United States objects for two reasons. First, it claims that because of the strict liability provisions of CERCLA, a third-party claim would be unwarranted until a judgment has been entered against Kurfees. Second, the United States contends that allowing the defendants to lengthen and complicate the proceeding would defeat the intent of CERCLA, which is to provide a speedy and efficient mechanism to reimburse the United States for its clean-up expenses. Neither ground is persuasive.

Fed. R. Civ. P. 14(a) states that "at any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." The defendant need not wait until the claim against him is reduced to a judgment; he may bring a third-party action for contribution or indemnity when it appears the facts give rise to that claim. 6 C. Wright and A. Miller, Federal Practice and Procedure § 1446 (1971). It may be that Kurfees has no claim against Louisville Coatings, but it is much too early for this court to tell. The third-party claim is not too speculative or frivolous to file.

Further, the court has other means at its disposal to prevent third-party claims from delaying or complicating the case. The court may bifurcate the trial or order discovery undertaken in different phases. The court is confident that the third-party claim will not impede a just and expeditious resolution of this action. Therefore,

IT IS ORDERED that defendant Kurfees Coatings, Inc.'s motion to file a third-party complaint is GRANTED.

DATED 1-31-89

Edward H. Johnstone, Chief Judge

United States District Court
Entered Feb. 2, 1989

cc: Counsel

(3)

No. 88-1404

Supreme Court, U.S.
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UNITED STATES OF AMERICA,
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL,

Respondents.

BRIEF OF AMICUS CURIAE ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court should review the decision by the Court of Appeals for the Fourth Circuit which affirmed the decision by the United States District Court for the District of South Carolina in applying section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982) ("CERCLA") retroactively and in a manner which requires some users of a waste storage facility to bear joint and several liability for all costs of cleanup, notwithstanding their concededly minute contribution to the waste stored at the site.

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Petitioners,

v.

UNITED STATES OF AMERICA, SOUTH CAROLINA
DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE ATLANTIC LEGAL FOUNDATION, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS[1]

This case concerns the issue whether the constitutional safeguards of due process and constitutional protections against excessive punishment are violated by the retroactive imposition

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[1] Pursuant to Rule 36 of the Rules of this Court, letters from counsel of record for the parties evidencing their consent to the filing of this brief have been filed with the Clerk of the Court.

of disproportionate liability in a case involving the application of section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607 (1982 & Supp. IV 1986) so as to require only a few generators of waste, who deposited their waste prior to the enactment of CERCLA, to bear the full cost of cleanup, notwithstanding the fact that the Government itself apportioned the volume of waste by allocating only 22.41% to the petitioners herein, and settled with waste generators to whom the Government allocated 77.5% of the volume, and where the petitioners contended at trial that (i) the burden was on the plaintiffs to show that petitioners' waste was at the site at the time of cleanup, (ii) the burden was on plaintiffs to show what portion of the waste was attributable to petitioners, and (iii) that the award against petitioners should be reduced by the pro rata share of the contribution to the harm by those waste generators who had settled.

The impact of this case will be significant, because the issue of liability for harm to the environment resulting from past actions, deemed safe and acceptable when taken, will arise with increasing frequency as the storage methods previously used are discovered to be inadequate, or substances that were deemed not to be harmful are later found to be toxic because of new scientific evidence or growing awareness of the deleterious impact of retention by the environment or humans of the toxic material and its cumulative effects are perceived. The costs of cleanup and cure may become vast, and their proper allocation give rise to significant economic and jurisprudential issues.

Amicus Atlantic Legal Foundation, Inc. is a not-for-profit,

tax exempt, legal foundation, incorporated in Pennsylvania. It is a public interest law firm whose mandate is to present balanced articulation of the public interest in litigations with broad impact and constitutional law significance, such as the instant case. The Foundation has appeared as amicus curiae before this Court in a number of cases involving public interest issues, most recently in support of petitioners in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556 (October Term, 1988). The Foundation submits this brief to assist the Court in its determination whether there are significant questions presented in this case which warrant review by this Court, and to urge the Court to grant the petition for certiorari.

SUMMARY OF ARGUMENT

CERCLA is a landmark statute of very broad application, enacted to remedy an important, critical and urgent problem of national scope, namely the threat to the environment resulting from past disposal of hazardous or toxic waste. Many cases brought under CERCLA are pending, and each case usually involves many parties and complicated issues of fact. The procedural approach taken in this case below raises important issues affecting the substantive rights of petitioners and other "generator" defendants in CERCLA cases. By refusing to decide the issue of allocation of responsibility in one proceeding, the trial court and the Court of Appeals have created a situation which exacerbates the risk that only a few defendants out of many users of a waste disposal site may be required to contribute to cleanup costs, in this and other cases

in an amount far exceeding their fair share of such costs. This Court heard argument last week in *Browning-Ferris*, *supra*, and if it decides in that case (as we urged in our *amicus* brief there) that the Eighth Amendment and the Due Process Clause of the Fifth Amendment require that civil damages be subject to a rule of proportionality, the procedure and the result in this case raise grave constitutional questions.

Petitioner's damage exposure is constitutionally disproportionate to any equitably allocable share attributable to their activities. For example, Monsanto could be held liable for the entire costs of $1.8 million and yet Monsanto contributed only 1.91% of the waste. Such a result would be punitive in nature and violates the Eighth and Fifth Amendments.

The retroactive application of CERCLA to petitioners violates the Due Process and Takings Clauses of the Fifth Amendment because it imposes liability for acts lawful when done.

The combined effect of the application of joint and several liability and retroactive application of CERCLA is to impose liability on parties who are not the causal agents of the harmful, but perfectly licit, acts of others in the past.

ARGUMENT

I. THE RULING BELOW RAISES CONSTITUTIONAL ISSUES OF EXCESSIVE DAMAGES

While the majority opinion of the Court of Appeals acknowledged the legitimacy of petitioners' concern that they might be responsible for paying more than their equitable share

of cleanup costs, *United States v. Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988), it assumed, as did the district court, that any inequitable allocation of costs would be rectified by a subsequent action for contribution. That assumption may be incorrect, and even if not incorrect, imposes an intolerable burden both on the petitioners and on the judicial system. The petitioners are precluded from seeking contribution from the settling defendants because CERCLA § 113(f)(2) provides that releases obtained by the settling defendants protect those defendants from claims for contribution. Thus, the only parties against whom petitioners can make claims for contribution are the plaintiffs below, the United States and the State of South Carolina (both of whose agencies were also generators of waste stored at the site) and non-settling private generators; such a claim against South Carolina may be barred by the doctrine of sovereign immunity. In *Pennsylvania v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, 108 S.Ct. 1219 (1988), *argued*, October 31, 1988 this Court is considering whether CERCLA has the effect of waiving a state's immunity. Had the trial court or the Court of Appeals mandated consolidation of all claims, this anomaly could have been avoided, for, by suing, South Carolina by suing waived any sovereign immunity claim as to petitioners' defense of set-off. Therefore, the ability to obtain contribution is not only wrongly and prejudicially delayed, it is also greatly curtailed as the settling defendants are immune and South Carolina probably is.

The concern for disproportionate liability is not merely hypothetical. In this case, the district court and the Court of Appeals each approved settlements with other generator defendants, without reducing the judgment against petitioners. By the

Government's own reckoning, Monsanto's share, by volume, of the waste generated was 1.91%, while that of AquAir, another defendant, was 1.75%. The total amount of the judgment below was $1,813,624.01 (of which $1,561,134.55 was awarded to the United States and $252,489.46 to the State of South Carolina). *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.Supp. 984 (D.S.C. 1984) (hereafter "*SCRDI*"). While this case was on appeal to the Fourth Circuit Court of Appeals, plaintiffs and AquAir entered into a settlement, which provided that AquAir would pay $5,000.00 (only 0.27% of the response costs), and that "AquAir shall not be liable for claims for contribution" for the cleanup of the Bluff Road site. Even the minute amount paid by AquAir was not deducted from the judgment against petitioners herein; thus Monsanto, with approximately the same allocable share of the waste material as AquAir, is jointly and severally liable for more than 360 times the amount paid by a defendant with the same through-put of waste. The Court of Appeals' approval of this settlement, an hazardous its failure to reduce petitioners' liability, illustrates a serious flaw in CERCLA § 113(f)(2).

We submit that the grossly disproportionate liability of non-settling defendants in CERCLA response recovery actions raises a constitutional issue of excessive fines and denial of due process. Although recovery actions under CERCLA have a remedial purpose when viewed in gross, the statute as applied, using the "joint and several" liability principle, when combined with the bar against contribution from settling defendants, results in damage awards against the remaining defendants (who are already handicapped by the draconian burden of proof rule adopted by the court below) that become, in effect, punitive,

not compensatory. Here, for example, by permitting double recovery by plaintiffs (since the amounts paid in settlement were not deducted from the judgment in favor of plaintiffs), plaintiffs received a windfall. Moreover, by permitting recovery from a defendant far in excess of his equitable share, the recovery as against that defendant becomes punitive.

Such excessive recoveries, we submit, fit two of the criteria enumerated by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963) for determining whether a sanction is punitive and bounded by the due process protections usually afforded in criminal proceedings.[2] The *Mendoza-Martinez* criteria were more recently approved by this Court in *United States v. Ward*, 448 U.S. 242, 249-251 (1980).

The "substance over form" approach sanctioned by this Court in *United States v. Ward*,[3] compels the conclusion that the

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2 The criteria (with those applicable here in italics) are:

"[1] Whether the sanction involves an affirmative disability or restraint, *[2] whether it has historically been considered as a punishment,* [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment–retribution and deterrence, [5] whether the behavior...is already a crime, [6] whether an alternative purpose to which it may be rationally connected is assignable for it, and *[7] whether it appears excessive in relation to the alternative purpose assigned....*" 372 U.S. at 168-169.

3 In that case, this Court held that the $500 fine for water pollution was not sufficiently penal to warrant the "procedural guarantees normally associated with criminal prosecutions," (448 U.S. at 253) because the fines were used to finance cleanup and defray the costs of administering the Water Pollution Control Act. (448 U.S. at 246). A significant

(continued...)

application of CERCLA by the courts below effects punishment, not merely compensation, and that Eighth Amendment and Fifth Amendment due process constitutional safeguards are violated when the statute is so applied. Most apposite is the principle of proportionality, recognized by this Court in *Solem v. Helm*, 463 U.S. 277 (1983). Here, Monsanto could be liable for damages 360 times its equitable share; in *Browning-Ferris*, *supra*, the punitive damages were "only" 117 times the compensatory damages. If this Court agrees with petitioners and *amicus* Atlantic Legal Foundation in *Browning-Ferris* that such an award violates the Eighth and Fifth Amendments, the inequitable allocation of recovery costs made possible by the decisions below in this case violates those same constitutional safeguards.

II. THE IMPOSITION OF JOINT AND SEVERAL LIABILITY VIOLATED CONSTITUTIONAL LIMITATIONS ON RETROACTIVE GOVERNMENT ACTION.

The decisions of the courts below imposing liability on petitioners ignore or misconstrue constitutional limitations on the creation and application of retroactive liability. The conduct of the petitioners in dealing with the Bluff Road waste site complied fully with the requirements of the existing law at the time they generated their waste. The Government never argued

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[3](...continued)
difference between the case at bar and *Ward* is the sharp contrast between a $500 fine and a possible liability of $1.8 million imposed on a generator of less than 2% of the waste material.

otherwise in the trial court and did not even name petitioners as defendants until after the enactment of CERCLA in December 1980.

The decisions below impose multi-million dollar liability on these generators, and on others in similar cases, solely on the basis of lawful conduct that ended months or years before CERCLA's enactment. As harsh as this is by itself, however, the statutory construction in this case by the courts below has made the retroactive application of Section 107 violative of the Fifth Amendment.

First, any requirement of causation or a causal nexus as a predicate for imposing liability was eliminated. Liability will be imposed, the Trial Court and the Court of Appeals held, if the Government shows merely that "at one time," waste materials from these generators like those present at the time of release "were on the site." (SCRDI, 653 F.Supp. at 991-92; 858 F.2d 160, 169-70). Second, the courts below held that Section 107 permitted the imposition of joint and several liability on these generator defendants for the total cleanup costs, regardless of the volume of their waste that may once have been present at the site. The imposition of such drastic retroactive liability on these facts cannot be considered solely remedial. The courts' application of the Section 107 has a punitive consequence. The Fifth Amendment has long been held to proscribe the imposition of such liabilities retroactively. But even apart from its punitive character, this interpretation and application of Section 107 far exceeds the constitutional limits on the retroactive creation of new liability for previously lawful conduct. The retroactive imposition of liability against these generators is inconsistent with the Due Process and Takings Clauses of the

Fifth Amendment.

A. The Retroactive Application Of CERCLA In This Case Violates Fifth Amendment Due Process Requirements.

The retroactive application of CERCLA § 107 on the facts of this case would be unprecedented. We do not believe that any prior case has imposed such extraordinary sanctions for previously lawful conduct. Rather, in the cases most directly analogous to this, the federal courts have avoided or invalidated retroactive imposition of liability as violative of the Article I prohibition against *ex post facto* laws, the Due Process Clause, or the Takings Clause of the Fifth Amendment.

Article I, § 9 of the Constitution prohibits Congress from enacting "any law 'which imposes a punishment for an act which was not punishable at the time it was committed.'" *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867)). *See also Galvan v. Press*, 347 U.S. 522, 531 (1954); *Ex parte Garland*, 71 U.S. 333 (1867). This prohibition "assure[s] that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. at 28-29. The "critical question [in determining if the prohibition of *ex post facto* laws applies] is whether the law changes the legal consequences of acts completed before its effective date." *Id.* at 31. If it does, the law is retroactive in effect and absolutely prohibited.

While the prohibition against *ex post facto* laws has traditionally been applied only to prosecutions for crime, *see*

Galvan v. Press, 347 U.S. 522, 531 n.4 (1953) its constraints have been incorporated as a component of the Due Process Clause to proscribe judicial and administrative action and even to the adoption of new procedural rules that would deny a litigant its right to a fair hearing if given retroactive effect. *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964). *See also* Justice Frankfurter's comment in *Galvan* on the relationship of the *ex post facto* prohibition and substantive due process. 347 U.S. at 531. *See generally*, Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 151-52 (1986). The principle should be applied in civil cases, where the imposition of liability can "fairly be designated punishment for past acts." *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960), (plurality opinion by Frankfurter, J.)

Applying this principle, the Court of Appeals for the Second Circuit recently held that the new treble damage provisions of the Trademark Counterfeiting Act of 1984 were "punitive" and could not be applied retroactively. *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985). These provisions were enacted to enhance the compensatory relief available to plaintiffs in trademark infringement cases, but they also had the effect of creating a new civil penalty of substantial proportions, as does section 107 of CERCLA. Plaintiffs in that case sought to impose the treble damage provision on pre-enactment conduct. The District Court and the Second Circuit rejected this claim on the ground that retroactive application of such a statute would present serious constitutional questions under both the *ex post facto* clause and the Due Process clause. 765 F.2d at 970-72.

Due process does not generally does not allow retroactive

application of statutes that have "harsh and oppressive" consequences. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977); *Welch v. Henry*, 305 U.S. 134, 147 (1938). In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976), on which the Circuit Court relied so heavily in affirming retroactive liability in the instant case, this Court said "The retrospective aspects of legislation ... must meet the test of due process ..."

In *Ralis v. RFE/RL*, Inc., 770 F.2d 1121 (1985), the District of Columbia Circuit refused to apply the Age Discrimination in Employment Act ("ADEA") retroactively. The plaintiff in that case had been required to retire in 1981, at age 65, by his overseas employer, at which time ADEA did not apply to non-U.S. employers. In 1984, however, Congress amended the ADEA to cover overseas employers of American citizens, and plaintiff sought to recover based on the new provisions. The court rejected this retroactive application in the absence of an explicit mandate by Congress:

> [T]he retrospective imposition of an obligation giving rise to a substantive liability is not lightly to be undertaken absent an express Congressional intent to render unlawful an act that was legal at the time it was done. In fact, merely to state the proposition that an obligation - imposing statute should be retroactively applied is to suggest the extraordinary nature of that notion.

770 F.2d at 1126.

As the court stated in *Ralis*, such a retroactive creation of a new cause of action is fundamentally inconsistent with Due

Process:

> The very notion of law is that known, or at least knowable, rules govern the conduct and affairs of those subject to the law's reach. It is quite incompatible with our fundamental notions of law that an act lawful at the time it was done can, at the stroke of the legislative pen, be rendered unlawful and the actor called to account for a completed, now-condemned deed in the halls of justice ...
>
> Retroactive impositions of civil liability are conceptually of a piece with *ex post facto* criminal laws. Instead of packing the actor off to jail, the legislature, with the judiciary's cooperation,...requires the payment of sums of money and the reordering of affairs, such as here Dr. Railis's prayer for back pay and reinstatement to a post filled over four years ago.

770 F.2d at 1127. The court refused to apply the statute retroactively to previously lawful conduct, although the legislative history on point suggested that Congress intended to deal with pre-enactment conduct. *Id.* at 1127.

The Court in *Ralis* cited *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) for the proposition, which we submit is directly applicable here, that the courts will not enforce retroactive liability, even where it is expressly mandated by the statute, if to do so would be "manifestly unjust".

While Section 107 is not a criminal statute, and damages awarded under it are to compensate the government for response costs, it is punitive when interpreted and applied, as it was below, to impose total liability for cleanup costs without requiring evidence of a casual connection, based on conduct that was completely lawful when undertaken. Its impact in cases such as this is "manifestly unjust".

B. The Fifth Amendment Limits Societal Cost-Shifting Through Retroactive Imposition of Liability

The Fifth Amendment permits the retroactive imposition of financial responsibility only when such burden is reasonably related to an individual's own past conduct and commitments. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 212, 228 (1986) (O'Connor, J., concurring). The Fifth Amendment prohibits "forcing some people alone to bear public burdens which, in...fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The interpretation of CERCLA § 107 by the Court of Appeals in this case directly contravenes these principles. The retroactive imposition of joint and several liability, without regard to any actual connection to past conduct, for the cleanup costs fairly attributable to other responsible parties, creates a system which "denies due process of law by taking the property of one and bestowing it upon another." *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 350 (1935). Even if petitioners were responsible for a fraction of the waste material present at the time of cleanup (which the Government was not required to prove in this case), the total cost of cleanup has

been impermissibly to these three parties by imposing joint and several liability. The Government's failure to name as defendants any of the various federal and state agencies admittedly responsible for waste at the site provides the most striking example of selective cost-shifting.

The imposition of joint and several liability has also forced these generators to pay the cleanup costs for other private parties responsible for materials at the site. The Government purpose is to shift the cost of cleanup to some (but not all) generators, rather than to itself determine, initially, who were the likely responsible parties. Because of joint and several liability, the Government will recover the total cleanup costs from those generators it selects as defendants, and then leave those entities to recover, if they can, from the parties actually responsible. As shown in point I, *supra*, this may not be possible as to a state agency. As a practical matter, given the often lengthy time between deposit of waste and final judgment, it may be impossible for defendants to recover from other past private users of a site, many of whom may no longer be in existence, and many of whom may not be financially capable of bearing their equitable share of the cleanup costs. We submit that this is nothing more nor less than taking the property of petitioners for the benefit of others, both innocent and culpable. Such a policy and practice, making culpability essentially irrelevant, deters rather than encourages, conscientious generators from exercising maximum care and expending maximum effort and expense to ensure that their hazardous waste does not pollute the environment. If even the most careful can, at the option of the Government be held liable for <u>all</u> the costs of curing the problem, economic

rationality dictates the least expenditure be made to prevent the problem.

C. The Rule of *Turner Elkhorn* Does Not Permit Retroactive Imposition Of Liability In This Case.

The Circuit Court held that the retroactive application of Section 107 was supported by this Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). This is an erroneous interpretation of the *Turner Elkhorn* decision, and if allowed to stand, it would have far-reaching mischievous consequences. A proper reading of *Turner Elkhorn* and subsequent opinions by this Court shows the lower courts' error.

Turner Elkhorn involved provisions of the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901, *et seq.* (1976), that enable former coal miners and their survivors to obtain compensation from mine owners for death or disability due to black lung disease. Mine operators presented a facial challenge under the Due Process Clause to the retroactive elements of this statute, which required the owners to compensate miners who had left coal mine employment before the effective date of the statute. This Court rejected that facial challenge, but in so doing, it construed the statute in a way that avoided the constitutional problems presented by the Circuit Court's application of Section 107. The Circuit Court in this case simply ignored these critical limitations.

The most important of these limitations is that in *Turner Elkhorn*, this Court required a definite causal connection between the compensable injury and the mine operator before

the mine operator could be held liable. The Black Lung Benefits Act required adjudication of individual responsibility for past employees, and no operator would be liable for disabilities or deaths that were not attributable to his own activities. As the Court said there:

> "In sum, the Due Process Clause poses no bar to requiring an operator to provide compensation for a former employee's death or disability ... arising out of employment in its mines, even if the former employee terminated his employment ... before the Act was passed." 428 U.S. at 19-20 (emphasis added)

Accordingly, this Court upheld retroactive imposition because the Act "allocated[d] to the mine operator an actual, measurable cost of his business." 428 U.S. at 19. If responsibility cannot be assigned to a particular mine operator, the Black Lung Benefits Act places the burden of payment on the Government, rather than on private parties. 30 U.S.C. §§ 932(c), 934 (1976). These provisions are in stark contrast to joint and several liability under CERCLA as applied here, which compels a few generator defendants to bear the burden for government agencies, insolvent parties and any other waste generator, without actual proof that the generator defendants were actually responsible.

Justice O'Connor's recent concurring opinion (joined by Justice Powell) in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 228 (1986) emphasizes the need for a nexus between acts of the party to be charged and imposition of liability. That case concerned provisions of the Multiemployer Pension Plan Amendments Act, Act of 1980, 29 U.S.C. §§ 1381-

1461 ("MPPAA") which imposed retroactive liability on companies that withdrew from certain defined benefit pension plans created for their employees. Unlike the application of Section 107 here, those retroactive provisions were directly related and at least roughly proportionate to previous commitments made by the companies affected, and the Court therefore concluded that these provisions did not on their face violate the Takings Clause. Nevertheless, Justice O'Connor, joined by Justice Powell, wrote a separate opinion to emphasize the constitutional problems that would arise if this retroactive liability were asserted "in the absence of any connection between the employer's conduct and some detriment to the employee." 475 U.S. at 229; *see also Turner Elkhorn, supra* at 19, 24-26. Justice O'Connor emphasized that retroactive withdrawal assessments could be so disproportionate to the obligation assumed as to create a Takings or a Due Process problem. *Id.* at 230-31.

MPPAA, unlike CERCLA as applied in this case, was intended to ensure that "an employer withdrawing from a multiemployer plan w[ill] ... complete funding its fair share of the plan's unfunded liabilities...." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 723 n.3 (1984) (emphasis added)

This case presents precisely the type of retroactive application of undifferentiated liability that this Court eschewed in *Turner Elkhorn* and *Connolly*.

CONCLUSION

In this case two slightly suspect principles, which sometimes have benign impact, have been applied by courts below to a grievous end. Joint and several liability, when combined with retroactive application, deprived petitioners of important constitutional protections.

This Court should grant a writ of certiorari and, on the merits, reverse the judgment below.

Dated: New York, New York
April 28, 1989

Respectfully submitted,

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BRIEF OF AMICUS CURIAE ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court should review the decision by the Court of Appeals for the Fourth Circuit which affirmed the decision by the United States District Court for the District of South Carolina in applying section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982) ("CERCLA") retroactively and in a manner which requires some users of a waste storage facility to bear joint and several liability for all costs of cleanup, notwithstanding their concededly minute contribution to the waste stored at the site.

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1 Pursuant to Rule 36 of the Rules of this Court, letters from counsel of record for the parties evidencing their consent to the filing of this brief have been filed with the Clerk of the Court.

of disproportionate liability in a case involving the application of section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607 (1982 & Supp. IV 1986) so as to require only a few generators of waste, who deposited their waste prior to the enactment of CERCLA, to bear the full cost of cleanup, notwithstanding the fact that the Government itself apportioned the volume of waste by allocating only 22.41% to the petitioners herein, and settled with waste generators to whom the Government allocated 77.5% of the volume, and where the petitioners contended at trial that (i) the burden was on the plaintiffs to show that petitioners' waste was at the site at the time of cleanup, (ii) the burden was on plaintiffs to show what portion of the waste was attributable to petitioners, and (iii) that the award against petitioners should be reduced by the pro rata share of the contribution to the harm by those waste generators who had settled.

The impact of this case will be significant, because the issue of liability for harm to the environment resulting from past actions, deemed safe and acceptable when taken, will arise with increasing frequency as the storage methods previously used are discovered to be inadequate, or substances that were deemed not to be harmful are later found to be toxic because of new scientific evidence or growing awareness of the deleterious impact of retention by the environment or humans of the toxic material and its cumulative effects are perceived. The costs of cleanup and cure may become vast, and their proper allocation give rise to significant economic and jurisprudential issues.

Amicus Atlantic Legal Foundation, Inc. is a not-for-profit,

tax exempt, legal foundation, incorporated in Pennsylvania. It is a public interest law firm whose mandate is to present balanced articulation of the public interest in litigations with broad impact and constitutional law significance, such as the instant case. The Foundation has appeared as amicus curiae before this Court in a number of cases involving public interest issues, most recently in support of petitioners in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556 (October Term, 1988). The Foundation submits this brief to assist the Court in its determination whether there are significant questions presented in this case which warrant review by this Court, and to urge the Court to grant the petition for certiorari.

SUMMARY OF ARGUMENT

CERCLA is a landmark statute of very broad application, enacted to remedy an important, critical and urgent problem of national scope, namely the threat to the environment resulting from past disposal of hazardous or toxic waste. Many cases brought under CERCLA are pending, and each case usually involves many parties and complicated issues of fact. The procedural approach taken in this case below raises important issues affecting the substantive rights of petitioners and other "generator" defendants in CERCLA cases. By refusing to decide the issue of allocation of responsibility in one proceeding, the trial court and the Court of Appeals have created a situation which exacerbates the risk that only a few defendants out of many users of a waste disposal site may be required to contribute to cleanup costs, in this and other cases

in an amount far exceeding their fair share of such costs. This Court heard argument last week in *Browning-Ferris*, *supra*, and if it decides in that case (as we urged in our *amicus* brief there) that the Eighth Amendment and the Due Process Clause of the Fifth Amendment require that civil damages be subject to a rule of proportionality, the procedure and the result in this case raise grave constitutional questions.

Petitioner's damage exposure is constitutionally disproportionate to any equitably allocable share attributable to their activities. For example, Monsanto could be held liable for the entire costs of $1.8 million and yet Monsanto contributed only 1.91% of the waste. Such a result would be punitive in nature and violates the Eighth and Fifth Amendments.

The retroactive application of CERCLA to petitioners violates the Due Process and Takings Clauses of the Fifth Amendment because it imposes liability for acts lawful when done.

The combined effect of the application of joint and several liability and retroactive application of CERCLA is to impose liability on parties who are not the causal agents of the harmful, but perfectly licit, acts of others in the past.

ARGUMENT

I. THE RULING BELOW RAISES CONSTITUTIONAL ISSUES OF EXCESSIVE DAMAGES

While the majority opinion of the Court of Appeals acknowledged the legitimacy of petitioners' concern that they might be responsible for paying more than their equitable share

of cleanup costs, *United States v. Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988), it assumed, as did the district court, that any inequitable allocation of costs would be rectified by a subsequent action for contribution. That assumption may be incorrect, and even if not incorrect, imposes an intolerable burden both on the petitioners and on the judicial system. The petitioners are precluded from seeking contribution from the settling defendants because CERCLA § 113(f)(2) provides that releases obtained by the settling defendants protect those defendants from claims for contribution. Thus, the only parties against whom petitioners can make claims for contribution are the plaintiffs below, the United States and the State of South Carolina (both of whose agencies were also generators of waste stored at the site) and non-settling private generators; such a claim against South Carolina may be barred by the doctrine of sovereign immunity. In *Pennsylvania v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, 108 S.Ct. 1219 (1988), *argued*, October 31, 1988 this Court is considering whether CERCLA has the effect of waiving a state's immunity. Had the trial court or the Court of Appeals mandated consolidation of all claims, this anomaly could have been avoided, for, by suing, South Carolina waived any sovereign immunity claim as to petitioners' defense of set-off. Therefore, the ability to obtain contribution is not only wrongly and prejudicially delayed, it is also greatly curtailed as the settling defendants are immune and South Carolina probably is.

The concern for disproportionate liability is not merely hypothetical. In this case, the district court and the Court of Appeals each approved settlements with other generator defendants, without reducing the judgment against petitioners. By the

Government's own reckoning, Monsanto's share, by volume, of the waste generated was 1.91%, while that of AquAir, another defendant, was 1.75%. The total amount of the judgment below was $1,813,624.01 (of which $1,561,134.55 was awarded to the United States and $252,489.46 to the State of South Carolina). *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.Supp. 984 (D.S.C. 1984) (hereafter "*SCRDI*"). While this case was on appeal to the Fourth Circuit Court of Appeals, plaintiffs and AquAir entered into a settlement, which provided that AquAir would pay $5,000.00 (only 0.27% of the response costs), and that "AquAir shall not be liable for claims for contribution" for the cleanup of the Bluff Road site. Even the minute amount paid by AquAir was not deducted from the judgment against petitioners herein; thus Monsanto, with approximately the same aliocable share of the waste material as AquAir, is jointly and severally liable for more than 360 times the amount paid by a defendant with the same through-put of waste. The Court of Appeals' approval of this settlement, and its failure to reduce petitioners' liability, illustrates a serious flaw in CERCLA § 113(f)(2).

We submit that the grossly disproportionate liability of non-settling defendants in CERCLA response recovery actions raises a constitutional issue of excessive fines and denial of due process. Although recovery actions under CERCLA have a remedial purpose when viewed in gross, the statute as applied, using the "joint and several" liability principle, when combined with the bar against contribution from settling defendants, results in damage awards against the remaining defendants (who are already handicapped by the draconian burden of proof rule adopted by the court below) that become, in effect, punitive,

not compensatory. Here, for example, by permitting double recovery by plaintiffs (since the amounts paid in settlement were not deducted from the judgment in favor of plaintiffs), plaintiffs received a windfall. Moreover, by permitting recovery from a defendant far in excess of his equitable share, the recovery as against that defendant becomes punitive.

Such excessive recoveries, we submit, fit two of the criteria enumerated by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963) for determining whether a sanction is punitive and bounded by the due process protections usually afforded in criminal proceedings.[2] The *Mendoza-Martinez* criteria were more recently approved by this Court in *United States v. Ward*, 448 U.S. 242, 249-251 (1980).

The "substance over form" approach sanctioned by this Court in *United States v. Ward*,[3] compels the conclusion that the

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2 The criteria (with those applicable here in italics) are:

"[1] Whether the sanction involves an affirmative disability or restraint, *[2] whether it has historically been considered as a punishment,* [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment–retribution and deterrence, [5] whether the behavior...is already a crime, [6] whether an alternative purpose to which it may be rationally connected is assignable for it, and *[7] whether it appears excessive in relation to the alternative purpose assigned....*" 372 U.S. at 168-169.

3 In that case, this Court held that the $500 fine for water pollution was not sufficiently penal to warrant the "procedural guarantees normally associated with criminal prosecutions," (448 U.S. at 253) because the fines were used to finance cleanup and defray the costs of administering the Water Pollution Control Act. (448 U.S. at 246). A significant

(continued...)

application of CERCLA by the courts below effects punishment, not merely compensation, and that Eighth Amendment and Fifth Amendment due process constitutional safeguards are violated when the statute is so applied. Most apposite is the principle of proportionality, recognized by this Court in *Solem v. Helm*, 463 U.S. 277 (1983). Here, Monsanto could be liable for damages 360 times its equitable share; in *Browning-Ferris*, *supra*, the punitive damages were "only" 117 times the compensatory damages. If this Court agrees with petitioners and *amicus* Atlantic Legal Foundation in *Browning-Ferris* that such an award violates the Eighth and Fifth Amendments, the inequitable allocation of recovery costs made possible by the decisions below in this case violates those same constitutional safeguards.

II. THE IMPOSITION OF JOINT AND SEVERAL LIABILITY VIOLATED CONSTITUTIONAL LIMITATIONS ON RETROACTIVE GOVERNMENT ACTION.

The decisions of the courts below imposing liability on petitioners ignore or misconstrue constitutional limitations on the creation and application of retroactive liability. The conduct of the petitioners in dealing with the Bluff Road waste site complied fully with the requirements of the existing law at the time they generated their waste. The Government never argued

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[3](...continued)
difference between the case at bar and *Ward* is the sharp contrast between a $500 fine and a possible liability of $1.8 million imposed on a generator of less than 2% of the waste material.

otherwise in the trial court and did not even name petitioners as defendants until after the enactment of CERCLA in December 1980.

The decisions below impose multi-million dollar liability on these generators, and on others in similar cases, solely on the basis of lawful conduct that ended months or years before CERCLA's enactment. As harsh as this is by itself, however, the statutory construction in this case by the courts below has made the retroactive application of Section 107 violative of the Fifth Amendment.

First, any requirement of causation or a causal nexus as a predicate for imposing liability was eliminated. Liability will be imposed, the Trial Court and the Court of Appeals held, if the Government shows merely that "at one time," waste materials from these generators like those present at the time of release "were on the site." (SCRDI, 653 F.Supp. at 991-92; 858 F.2d 160, 169-70). Second, the courts below held that Section 107 permitted the imposition of joint and several liability on these generator defendants for the total cleanup costs, regardless of the volume of their waste that may once have been present at the site. The imposition of such drastic retroactive liability on these facts cannot be considered solely remedial. The courts' application of the Section 107 has a punitive consequence. The Fifth Amendment has long been held to proscribe the imposition of such liabilities retroactively. But even apart from its punitive character, this interpretation and application of Section 107 far exceeds the constitutional limits on the retroactive creation of new liability for previously lawful conduct. The retroactive imposition of liability against these generators is inconsistent with the Due Process and Takings Clauses of the

Fifth Amendment.

A. The Retroactive Application Of CERCLA In This Case Violates Fifth Amendment Due Process Requirements.

The retroactive application of CERCLA § 107 on the facts of this case would be unprecedented. We do not believe that any prior case has imposed such extraordinary sanctions for previously lawful conduct. Rather, in the cases most directly analogous to this, the federal courts have avoided or invalidated retroactive imposition of liability as violative of the Article I prohibition against *ex post facto* laws, the Due Process Clause, or the Takings Clause of the Fifth Amendment.

Article I, § 9 of the Constitution prohibits Congress from enacting "any law 'which imposes a punishment for an act which was not punishable at the time it was committed.'" *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867)). *See also Galvan v. Press*, 347 U.S. 522, 531 (1954); *Ex parte Garland*, 71 U.S. 333 (1867). This prohibition "assure[s] that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. at 28-29. The "critical question [in determining if the prohibition of *ex post facto* laws applies] is whether the law changes the legal consequences of acts completed before its effective date." *Id.* at 31. If it does, the law is retroactive in effect and absolutely prohibited.

While the prohibition against *ex post facto* laws has traditionally been applied only to prosecutions for crime, *see*

Galvan v. Press, 347 U.S. 522, 531 n.4 (1953) its constraints have been incorporated as a component of the Due Process Clause to proscribe judicial and administrative action and even to the adoption of new procedural rules that would deny a litigant its right to a fair hearing if given retroactive effect. *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964). *See also* Justice Frankfurter's comment in *Galvan* on the relationship of the *ex post facto* prohibition and substantive due process. 347 U.S. at 531. *See generally*, Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 151-52 (1986). The principle should be applied in civil cases, where the imposition of liability can "fairly be designated punishment for past acts." *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960), (plurality opinion by Frankfurter, J.)

Applying this principle, the Court of Appeals for the Second Circuit recently held that the new treble damage provisions of the Trademark Counterfeiting Act of 1984 were "punitive" and could not be applied retroactively. *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985). These provisions were enacted to enhance the compensatory relief available to plaintiffs in trademark infringement cases, but they also had the effect of creating a new civil penalty of substantial proportions, as does section 107 of CERCLA. Plaintiffs in that case sought to impose the treble damage provision on pre-enactment conduct. The District Court and the Second Circuit rejected this claim on the ground that retroactive application of such a statute would present serious constitutional questions under both the *ex post facto* clause and the Due Process clause. 765 F.2d at 970-72.

Due process does not generally allow retroactive

application of statutes that have "harsh and oppressive" consequences. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977); *Welch v. Henry*, 305 U.S. 134, 147 (1938). In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976), on which the Circuit Court relied so heavily in affirming retroactive liability in the instant case, this Court said "The retrospective aspects of legislation ... must meet the test of due process ..."

In *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (1985), the District of Columbia Circuit refused to apply the Age Discrimination in Employment Act ("ADEA") retroactively. The plaintiff in that case had been required to retire in 1981, at age 65, by his overseas employer, at which time ADEA did not apply to non-U.S. employers. In 1984, however, Congress amended the ADEA to cover overseas employers of American citizens, and plaintiff sought to recover based on the new provisions. The court rejected this retroactive application in the absence of an explicit mandate by Congress:

> [T]he retrospective imposition of an obligation giving rise to a substantive liability is not lightly to be undertaken absent an express Congressional intent to render unlawful an act that was legal at the time it was done. In fact, merely to state the proposition that an obligation - imposing statute should be retroactively applied is to suggest the extraordinary nature of that notion.

770 F.2d at 1126.

As the court stated in *Ralis*, such a retroactive creation of a new cause of action is fundamentally inconsistent with Due

Process:

> The very notion of law is that known, or at least knowable, rules govern the conduct and affairs of those subject to the law's reach. It is quite incompatible with our fundamental notions of law that an act lawful at the time it was done can, at the stroke of the legislative pen, be rendered unlawful and the actor called to account for a completed, now-condemned deed in the halls of justice ...
>
> Retroactive impositions of civil liability are conceptually of a piece with *ex post facto* criminal laws. Instead of packing the actor off to jail, the legislature, with the judiciary's cooperation,...requires the payment of sums of money and the reordering of affairs, such as here Dr. Railis's prayer for back pay and reinstatement to a post filled over four years ago.

770 F.2d at 1127. The court refused to apply the statute retroactively to previously lawful conduct, although the legislative history on point suggested that Congress intended to deal with pre-enactment conduct. *Id.* at 1127.

The Court in *Ralis* cited *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) for the proposition, which we submit is directly applicable here, that the courts will not enforce retroactive liability, even where it is expressly mandated by the statute, if to do so would be "manifestly unjust".

While Section 107 is not a criminal statute, and damages awarded under it are to compensate the government for response costs, it is punitive when interpreted and applied, as it was below, to impose total liability for cleanup costs without requiring evidence of a casual connection, based on conduct that was completely lawful when undertaken. Its impact in cases such as this is "manifestly unjust".

B. The Fifth Amendment Limits Societal Cost-Shifting Through Retroactive Imposition of Liability

The Fifth Amendment permits the retroactive imposition of financial responsibility only when such burden is reasonably related to an individual's own past conduct and commitments. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 212, 228 (1986) (O'Connor, J., concurring). The Fifth Amendment prohibits "forcing some people alone to bear public burdens which, in...fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The interpretation of CERCLA § 107 by the Court of Appeals in this case directly contravenes these principles. The retroactive imposition of joint and several liability, without regard to any actual connection to past conduct, for the cleanup costs fairly attributable to other responsible parties, creates a system which "denies due process of law by taking the property of one and bestowing it upon another." *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 350 (1935). Even if petitioners were responsible for a fraction of the waste material present at the time of cleanup (which the Government was not required to prove in this case), the total cost of cleanup has

been impermissibly allocated to these three parties by imposing joint and several liability. The Government's failure to name as defendants any of the various federal and state agencies admittedly responsible for waste at the site provides the most striking example of selective cost-shifting.

The imposition of joint and several liability has also forced these generators to pay the cleanup costs for other private parties responsible for materials at the site. The Government purpose is to shift the cost of cleanup to some (but not all) generators, rather than to itself determine, initially, who were the likely responsible parties. Because of joint and several liability, the Government will recover the total cleanup costs from those generators it selects as defendants, and then leave those entities to recover, if they can, from the parties actually responsible. As shown in point I, *supra*, this may not be possible as to a state agency. As a practical matter, given the often lengthy time between deposit of waste and final judgment, it may be impossible for defendants to recover from other past private users of a site, many of whom may no longer be in existence, and many of whom may not be financially capable of bearing their equitable share of the cleanup costs. We submit that this is nothing more nor less than taking the property of petitioners for the benefit of others, both innocent and culpable. Such a policy and practice, making culpability essentially irrelevant, deters rather than encourages, conscientious generators from exercising maximum care and expending maximum effort and expense to ensure that their hazardous waste does not pollute the environment. If even the most careful can, at the option of the Government be held liable for <u>all</u> the costs of curing the problem, economic

rationality dictates the least expenditure be made to prevent the problem.

C. The Rule of *Turner Elkhorn* Does Not Permit Retroactive Imposition Of Liability In This Case.

The Circuit Court held that the retroactive application of Section 107 was supported by this Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). This is an erroneous interpretation of the *Turner Elkhorn* decision, and if allowed to stand, it would have far-reaching mischievous consequences. A proper reading of *Turner Elkhorn* and subsequent opinions by this Court shows the lower courts' error.

Turner Elkhorn involved provisions of the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901, *et seq.* (1976), that enable former coal miners and their survivors to obtain compensation from mine owners for death or disability due to black lung disease. Mine operators presented a facial challenge under the Due Process Clause to the retroactive elements of this statute, which required the owners to compensate miners who had left coal mine employment before the effective date of the statute. This Court rejected that facial challenge, but in so doing, it construed the statute in a way that avoided the constitutional problems presented by the Circuit Court's application of Section 107. The Circuit Court in this case simply ignored these critical limitations.

The most important of these limitations is that in *Turner Elkhorn*, this Court required a definite causal connection between the compensable injury and the mine operator before

the mine operator could be held liable. The Black Lung Benefits Act required adjudication of individual responsibility for past employees, and no operator would be liable for disabilities or deaths that were not attributable to his own activities. As the Court said there:

> "In sum, the Due Process Clause poses no bar to requiring an operator to provide compensation for a former employee's death or disability ... arising out of employment in its mines, even if the former employee terminated his employment ... before the Act was passed." 428 U.S. at 19-20 (emphasis added)

Accordingly, this Court upheld retroactive imposition because the Act "allocated[d] to the mine operator an actual, measurable cost of his business." 428 U.S. at 19. If responsibility cannot be assigned to a particular mine operator, the Black Lung Benefits Act places the burden of payment on the Government, rather than on private parties. 30 U.S.C. §§ 932(c), 934 (1976). These provisions are in stark contrast to joint and several liability under CERCLA as applied here, which compels a few generator defendants to bear the burden for government agencies, insolvent parties and any other waste generator, without actual proof that the generator defendants were actually responsible.

Justice O'Connor's recent concurring opinion (joined by Justice Powell) in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 228 (1986) emphasizes the need for a nexus between acts of the party to be charged and imposition of liability. That case concerned provisions of the Multiemployer Pension Plan Amendments Act, Act of 1980, 29 U.S.C. §§ 1381-

1461 ("MPPAA") which imposed retroactive liability on companies that withdrew from certain defined benefit pension plans created for their employees. Unlike the application of Section 107 here, those retroactive provisions were directly related and at least roughly proportionate to previous commitments made by the companies affected, and the Court therefore concluded that these provisions did not on their face violate the Takings Clause. Nevertheless, Justice O'Connor, joined by Justice Powell, wrote a separate opinion to emphasize the constitutional problems that would arise if this retroactive liability were asserted "in the absence of any connection between the employer's conduct and some detriment to the employee." 475 U.S. at 229; *see also Turner Elkhorn, supra* at 19, 24-26. Justice O'Connor emphasized that retroactive withdrawal assessments could be so disproportionate to the obligation assumed as to create a Takings or a Due Process problem. *Id.* at 230-31.

MPPAA, unlike CERCLA as applied in this case, was intended to ensure that "an employer withdrawing from a multiemployer plan w[ill] ... complete funding its fair share of the plan's unfunded liabilities...." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 723 n.3 (1984) (emphasis added)

This case presents precisely the type of retroactive application of undifferentiated liability that this Court eschewed in *Turner Elkhorn* and *Connolly*.

CONCLUSION

In this case two slightly suspect principles, which sometimes have benign impact, have been applied by courts below to a grievous end. Joint and several liability, when combined with retroactive application, deprived petitioners of important constitutional protections.

This Court should grant a writ of certiorari and, on the merits, reverse the judgment below.

Dated: New York, New York
April 28, 1989

Respectfully submitted,

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